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INTERNATIONAL TELEGRAPH

AND TELEPHONE COMPANY

NEW YORK, N. Y.

(1911)

(25,361)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 531.

THE CITY OF MITCHELL, APPELLANT,

*vs.*

DAKOTA CENTRAL TELEPHONE COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF SOUTH DAKOTA.

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1 In the District Court of the United States, District of  
South Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation,  
Complainant,  
vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

*Citation on Appeal.*

UNITED STATES OF AMERICA, ss:

To the above named Complainant, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the 9th day of October, A. D. 1916, pursuant to an order allowing an appeal, filed and entered in the Clerk's office of the District Court of the United States for the District of South Dakota, from a final decree signed, filed and entered on the 14th day of September, A. D. 1915, in that certain suit being in Equity Number 5, wherein you are Complainant and Appellee and the City of Mitchell, a municipal corporation, is defendant and Appellant, to show cause, if any there be, why the decree rendered against the said Appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Dated this 15th day of April, A. D. 1916.

WILBUR F. BOOTH,  
*United States District Judge for the  
District of South Dakota.*

2 [Endorsed:] #5 S. D. Equity. United States District Court,  
District of South Dakota, Southern Division. Dakota Central Telephone Company, a corporation, Plaintiff, vs. The City of Mitchell, a municipal corporation, Defendant. Due and personal service of the within Citation on Appeal upon me at Huron, South Dakota, is admitted this 15- day of April, A. D. 1916. Null & Ruydel, Attorney for Plaintiff. Gamble, Wagner & Danforth, Lauritz Miller, Attorneys for Defendant, Sioux Falls, South Dakota. Filed April 15, 1916. Oliver S. Pendar, clerk, by C. C. Schwarz.

3 In the District Court of the United States of America, in and for  
the Southern Division of the District of South Dakota.

In Equity. No. 5, S. D.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation,  
Plaintiff,

vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

Be it remembered, that on the 25th day of March, A. D. 1913,  
there was filed in the above entitled court, on behalf of plaintiff,  
Bill in Equity; which said Bill in Equity is in words and figures the  
following, to-wit:

United States District Court, District of South Dakota, Southern  
Division.

In Equity.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation,  
Complainant,

vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

*Bill of Complaint.*

To the Judges of the District Court of the United States for the  
District of South Dakota:

The Dakota Central Telephone Company, a corporation, organized and existing under and by virtue of the laws of the State of South Dakota, with its principal place of business at Aberdeen, South Dakota, by leave of Court first obtained, brings  
4 this, its bill of complaint, against the City of Mitchell, a municipal corporation, existing within, and by virtue of the laws of the State of South Dakota, and thereupon your orator complains and says:

I.

That your orator is now and at all times since the 30th day of August, 1904, has been a corporation organized under and by virtue of the laws of the State of South Dakota, empowered and chartered to purchase, lease, construct, and operate telephone lines and exchanges.

That within the meaning and purview of the laws of the State of South Dakota, your orator is known as a telephone company and common carrier, that by Section 554 of the Civil Code of the Compiled Laws (1903) of the State of South Dakota, which is as follows: "There is hereby granted to the owners of any telegraph or

telephone lines operated in this state, the right of way over lands and real property belonging to the state, and the right to use public grounds, streets, alleys, and highways in this state, subject to control of the proper municipal authorities as to what grounds, streets, alleys, or highways said line shall run over or across, and the place the poles to support the wires are located; the right of way over real property granted in this act may be acquired in the same manner and by like proceedings as provided for railroad corporations." Your orator was granted the right of way

5 for telephone purposes over the public grounds, streets, alleys, and highways in the State of South Dakota. That since the organization of your orator on last above mentioned date, your orator has acquired by purchase and construction, certain lines of telephone and certain telephone exchanges, and has been engaged as a common carrier in the business of rendering telephone service and transmitting telephone messages and communications for the general public on equal terms without discrimination throughout and between the cities, towns, villages, and districts in and to which your orator has telephone lines and exchanges.

That at the present time your orator, as owner, is actively engaged in the operation of telephone exchanges in about eighty-five cities and towns, and has about two hundred and sixty-five telephone stations, other than exchanges, situated in the State of South Dakota, North Dakota, and Minnesota.

That all of said cities, towns, villages and telephone stations are connected by telephone lines owned and operated by your orator.

That said telephone system consists of about eighty-five telephone exchanges, about two hundred sixty-five stations and about five thousand miles of telephone line outside of the lines situated in cities and towns. That in the construction, purchase, and acquisition of said telephone lines, exchanges and stations, your orator has expended more than \$2,000,000.

## II.

6 That the defendant, City of Mitchell, is and at all times, hereinafter mentioned, has been a municipal corporation situated in Davison County, South Dakota.

## III.

That heretofore and on or about May 11th, 1898, the City Council of the City of Mitchell, adopted and passed, and the Mayor of said City approved an Ordinance in words and figures as follows:

### Ordinance No. 135.

An ordinance granting to F. E. Elce, his Associates, Heirs, and Assigns the Use of the Streets, Alleys and Public Grounds of the city of Mitchell, South Dakota, for the Erection and Maintenance of a Public Telephone System.

Be it ordained by the city council of the city of Mitchell, South Dakota.

Section 1. That in consideration of the benefits to be derived the inhabitants of the City of Mitchell by the establishment of a public telephone system in said city, the said F. E. Elce, his associates, heirs and assigns are hereby granted the right to the use of the streets, alleys, and public grounds of the said city of Mitchell, South Dakota, for the erection and maintenance of a public telephone system for the term of fifteen years from the date of adoption or approval of this ordinance.

Section 2. That for such purposes the said F. E. Elce, his associates, heirs and assigns may enter upon any of the streets, alleys and public grounds of the said city of Mitchell, and erect poles and stretch wires, and erect such other appliances as may be necessary and proper for the establishment of such telephone system.

7 Provided, that such poles, wires, and appliances shall not be so placed as to in any way interfere with the rights of owners of adjacent property, nor with the free passage of vehicles; and that lines or poles, wires and other appliances, shall be located as far as possible in the alleys of said city. Provided further that in no case shall the poles, wires and other appliances be placed on the main street, except for the purpose of crossing said main street upon the streets running east and west. It is also provided that the said city council shall have the right to direct the location of poles and lines or wires upon the said streets, and the erection of all poles and lines or wires shall be under the direction and subject to the approval of the city council of the said city of Mitchell.

Section 3. That the privileges herein granted are given under the following conditions, to-wit: That the said F. B. Elce, his associates, heirs and assigns, shall, within six months after the passage and approval of this ordinance have at least twenty telephones in successful operation; that the said F. B. Elce, his associates, heirs, and assigns shall provide a suitable and convenient place for a central office and shall maintain such office in operation during the business hours of each week day during the year, and at such other times as business may demand; and the maximum rent for the said pay telephones established under this ordinance shall not exceed five dollars per month for business houses and one dollar and twenty-cents per month for residence houses, for service within the

limits of the city of Mitchell; provided, that if the said F. B. Elce, his associates, heirs, and assigns shall fail or neglect to have at least twenty telephones in successful operation at the expiration of six months from the adoption and approval of this ordinance then this ordinance shall be null and void and all rights and privileges granted thereunder revoked.

Section 4. That in consideration of the said city of Mitchell granting to the said F. B. Elce, his associates, heirs and assigns the right and privilege to use the streets, alleys and public grounds of the said city of Mitchell for the erection and maintenance of a public telephone system, the said F. B. Elce, his associates, heirs and assigns, shall erect and maintain three telephones at such places as the city council shall direct, and that the said three telephones shall be furnished to the said city during the term of fifteen years without cost or expense to the city of Mitchell; provided a

that at any time after three years from the adoption and approval of this ordinance that the gross receipts of the said telephone system for any one year shall be in excess of the sum of two thousand four hundred dollars (\$2,400.), the said F. B. Elce, his associates, heirs and assigns, shall pay to the city of Mitchell ten per cent of the amount in excess of Two Thousand Four Hundred dollars (\$2,400), received as gross receipts from the said telephone system, which said sum shall be paid to the city at the end of each and every year, and the city council shall have the right and privilege to examine the books of the said telephone system for the purpose of ascertaining the gross earnings of the said telephone system.

Section 5. That no exclusive right or privilege is hereby granted to the said F. B. Elce, his associates, heirs and assigns.

Section 6. That if the said F. B. Elce, his associates, heirs and assigns, shall fail to comply with any of the provisions of this ordinance, then the city council of the city of Mitchell, shall have the power to declare the privileges granted in this ordinance forfeited and revoked; Provided, that due notice of such intention shall be given by the said city council to the said F. B. Elce, his associates, heirs, and assigns, and a reasonable time thereafter shall be given him or them in which to comply with said provisions.

Section 7. This ordinance shall take effect and be in force from and after its passage, approval and publication.

Adopted and Approved May 11th, 1898.

THOMAS FULLERTON, *Mayor*.

Attest:

J. K. SMITH,  
*City Auditor.*

That said ordinance was duly published, and the said F. B. Elce, the grantee in said ordinance No. 135, duly accepted the terms and conditions of said ordinance, and that under and in pursuance thereof the said grantee therein, F. B. Elce, installed a local telephone system in said city of Mitchell, South Dakota, and used and occupied the streets, alleys, public grounds, and highways of said city with the poles, wires, and fixtures used in the operation of said telephone system; that the said F. B. Elce within six months after the passage, approval and publication of said ordinance No. 135 did have not less than twenty telephones installed and in successful operation in said city as provided by said ordinance, and that said F. B. Elce conducted and operated said local telephone system in said city of Mitchell, South Dakota, until on or about the 8th day of July, 1904.

#### IV.

That the Dakota Central Telephone Lines, a corporation organized and doing business under the laws of the State of South Dakota, about March 1904, applied to the City for its consent to the construction of a telephone system in the said City of Mitchell. That on or about the 21st day of March, 1904, the city council of the

City of Mitchell adopted and passed, and the Mayor of said city approved an ordinance in words and figures as follows:

Ordinance No. 174.

An ordinance to grant permission to the Dakota Central Telephone Lines, (Inc.) their successors or assigns, the right to erect poles and fixtures, and to string wires, for the purpose of operating long distance telephone lines, within and through the city of Mitchell, South Dakota.

11 Be it ordained by the council of the city of Mitchell, S. D.

Section 1. That there is hereby granted the right and privilege, given to the Dakota Central Telephone Lines, (Inc.) their successors and assigns, to erect poles, and string wires on any of the streets, alleys and public highways of the city of Mitchell, excepting Main Street, Park Avenue, Fourth Street and Fifth Street, and maintain the same for a period of twenty years, from and after the passage and approval of this ordinance, for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing near or at a distance from Mitchell, and all such rights to be continued on the conditions herein named.

Section 2. The poles and wires are to be located under the direction of the street commissioner, or a committee appointed by the city council.

Section 3. All poles, wires and fixtures are to be placed so as not to interfere with the ordinary travel and traffic on the streets, alleys and public highways, or shade or ornamental trees, in said city of Mitchell; and are not to interfere with the flow of water in any main, sewer, or gutter in said city of Mitchell; and the city of Mitchell may adopt any reasonable rules and regulations of a police nature, as may be deemed necessary, not destructive, however, to the rights and privileges herein granted.

12 Section 4. The rights and privileges herein granted are not exclusive, and the said city of Mitchell reserves the right to grant the same rights and privileges to other parties, the same, however, not to interfere with the rights and privileges herein granted.

Section 5. In consideration of the above, the city of Mitchell, S. D. shall have the right to string wires on the poles of the Dakota Central Telephone Lines for fire alarm purposes, said work to be superintended by the above company and such wires are not to interfere with the workings of the wires of the Dakota Central Telephone Lines.

Section 6. This ordinance shall be in effect, from and after the date of its passage and approval.

Passed March 21st, 1904.

Approved.

J. L. HANNETT,

*Act. Mayor.*

J. G. MARKHAM,

*Auditor.*



That said ordinance was duly published according to law.

## V.

That said ordinance No. 174 was found to be insufficient for its purposes and thereupon said Dakota Central Telephone Lines applied to the City Council of the City of Mitchell for a further ordinance. That pursuant to such application and on or about the 6th day of June, 1904, said city council adopted and passed, and on June 7th, 1904, the Mayor approved of an ordinance in words and to the effect as follows:

### Ordinance No. 180.

An ordinance to grant permission to the Dakota Central Telephone Lines, (inc.), their successors or assigns, the right to erect poles and fixtures, and to string wires, for the purpose of operating a long distance telephone system, within and through the city of Mitchell, South Dakota.

Be it ordained by the city council of the city of Mitchell, South Dakota.

Section 1. That there is hereby granted the right and privilege, given to the Dakota Central Telephone lines, (Inc.), their successors or assigns, to erect poles, and string wires on any of the streets, alleys and public highways of the city of Mitchell, excepting Main, Park Avenue, Fourth and Fifth Streets, this exception, however, not to prohibit the crossing of Main, Park Avenue and Fourth and Fifth Streets, at right angles, where it is necessary, and maintain the same for a period of twenty years, from and after the passage and approval of this ordinance, for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing in, near or at a distance from Mitchell, and all such rights to be continued on the same conditions herein named.

Section 2. The poles and wires are to be located under the direction of a committee, appointed by the city council.

Section 3. All poles, wires and fixtures are to be placed so as not to interfere with the ordinary travel and traffic on the streets, alleys and public highways or shade or ornamental trees in said city of Mitchell; and are not to interfere with the flow of water in any main, sewer, or gutter in said city of Mitchell; and the city of Mitchell may adopt any reasonable rules and regulations of a police nature, as may be deemed necessary, not destructive, however, to the rights and privileges herein granted.

Section 4. The rights and privileges herein granted are not exclusive, and the said city of Mitchell, reserves the right to grant the same rights and privileges to other parties, the same, however, not to interfere with the rights and privileges herein granted.

Section 5. In consideration of the above, the city of Mitchell, shall have the right to string wires on the poles of the Dakota Central



Telephone lines for fire alarm purposes, said work to be superintended by the above company and such wires are not to interfere with the workings of the wires of the Dakota Central Telephone lines.

Section 6. This ordinance shall be in effect, from and after the date of its passage and approval. Passed June 6th, 1904.

Approved June 7th, 1904.

GEO. A. SILSBY, *Mayor.*

J. G. MARKHAM, *Auditor.*

That said ordinance was duly published according to law.

## VI.

That at the time of the adoption and approval of said ordinances No. 174 and No. 180, the telephone instruments then in general use in telephone exchanges, and in use in the Mitchell exchange were not instruments that could be used successfully for conversations

over long distances, but that there had been developed certain improved telephone instruments that could be used for such conversations over long distances. That such telephones were then known as "Long distance telephones," and were only supplied to subscribers at telephone exchanges by special arrangement with the individual subscribers who desired an instrument efficient for both local and long distance conversations.

That at said time, the art of telephony had advanced so that the public in general were demanding the installation of "Long distance telephones" in local telephone exchanges.

That long prior to the adoption of said ordinances, Nos. 174 and 180, the Southern Dakota Telephone Company had constructed certain telephone lines between, and into, the city of Mitchell, and certain other cities and towns in South Dakota. That said Southern Dakota Telephone Company had secured the consent of the city of Mitchell to the construction of such lines and such lines were then commonly known as "Toll lines" as distinguished from telephone exchanges. That during the year 1903, said Dakota Central Telephone Lines purchased the said Toll lines from said Southern Dakota Telephone Company, and were operating such Toll Lines into the City of Mitchell at the time of, and for a long period prior to, the adoption and approval of said ordinances Nos. 174 and 180.

## VII.

That said Dakota Central Telephone Lines relying on the consent of the city of Mitchell, as expressed in said Ordinance No. 174 on or about May 25th, 1904, entered into a contract with said F. B. Elce,

whereby said Dakota Central Telephone Lines purchased from said F. B. Elce, "all the property now (then) known as the Mitchell Telephone Exchange, consisting of poles, wires, cables, insulators, and instruments, switchboard and appliances of every nature, now (then) used in the exchange known as the Mitchell Telephone Exchange," as well as certain real property

d in connection therewith. The possession to be transferred on the 1st, 1904.

That after entering into said contract for the purchase of said exchange, said Dakota Central Telephone Lines discovered the insufficiency of said Ordinance No. 174 and thereupon applied to the City Council for said Ordinance No. 180. That when said Ordinance 180 was enacted and approved and on or about July 6th, 1904, said Dakota Central Telephone Lines completed the purchase of said exchange, and took possession of the same. Thereafter said exchange was owned and operated by said Dakota Central Telephone Lines, until about October 2nd, 1904, when said exchange, together with all other exchanges, lines, and telephone properties, rights and franchises owned by said Dakota Central Telephone Lines were conveyed to the complainant, Dakota Central Telephone Company.

### VIII.

That after the purchase of all the exchanges, lines, telephone properties, rights and franchises of the Dakota Central Telephone Company by the complainant, the complainant entered into possession of all said property and particularly the said exchange in the city of Mitchell, and the Toll lines running into and out of the said City of Mitchell. And thereafter the complainant has continuously operated said exchange and toll lines, and is now operating the same.

### IX.

That thereafter there was such improvement in the telephone instruments and appliances, that it became desirable to re-construct the telephone exchange in the city of Mitchell, in order to install a telephone system known as the Automatic Telephone System. That to properly install such Automatic System it was necessary to put in permanent underground ways in which to place the wires and cables, and otherwise construct and install expensive instrumentalities. That the complainant might be secure in making such extensive improvements, it applied to the City Council of Mitchell for its consent to the same, whereupon and on or about the 10th day of April, 1907, the city council passed, and the Mayor approved an Ordinance as follows:

"Be it resolved by the City Council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, their successors or assigns, to place, construct and maintain through and under the streets and alleys, and public grounds of said city, all conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public a general communication by telephone and other improved appliances."

### X.

That after the passage and approval of said ordinance on April 10th, 1907, the complainant relying on said ordinance as well as

the ordinances hereinbefore mentioned, began to reconstruct, and extend its said telephone exchange in the city of Mitchell. That said work was undertaken under a definite plan of placing all wires within the business district of said city under-ground, and with the plan of finally unstalling said Automatic Telephone System. That while such work and improvements were under way, the telephone exchange was kept in continuous operation which caused the work to proceed very slowly. That such work was carried on until the plant was thoroughly prepared for the installation of the said Automatic System, and finally during the latter part of the year 1912, a complete automatic telephone system was installed and put into operation and service.

That as a part of the improvements necessary to the installation of said Automatic System, the complainant erected a fire-proof exchange building.

That, in all, this complainant has expended more than \$110,000.00 in the erection of said exchange building, and in the installation of said Automatic Telephone System.

That said Automatic Telephone System is now in successful operation, and is the most efficient system known to the art of telephony, and said Automatic Telephones are efficient for use, both in local and in long distance conversations.

19 That there are about 1,100 subscribers to said Automatic Telephone System in said city of Mitchell, each and all of whom are in direct connection, and can communicate with persons at all the exchanges and stations on complainant's telephone system in South Dakota, North Dakota, and Minnesota.

## XI.

That since the complainant purchased said telephone exchange and toll lines in said City of Mitchell, the said City of Mitchell has at all times designated the streets and alleys, and the places where poles, lines, and underground work should be placed.

That the complainant has at all times obeyed the commands, rules, and regulations of said city in the placing of its poles, lines, and conduits in the streets and alleys of said city and in the operation of said Telephone Exchange and toll lines in said city.

## XII.

Your orator further shows to the court that by reason of the incorporation of your orator as a telephone company, and the grant of right of way in the streets and alleys and highways of the State of South Dakota, and by reason of the acceptance of the franchises, rights, and privileges conferred upon it by the State of South Dakota as a telephone company, and the construction, purchase and operation of said telephone lines and exchanges in the City of Mitchell as aforesaid, and the consent of said City of Mitchell to

20 the construction and establishment of said telephone exchange and telephone lines in the City of Mitchell, South Dakota, your orator has acquired a vested right to maintain and

operate its said telephone exchange and lines, and that to secure your orator in the peaceful enjoyment of such vested rights as against the wrongful acts of the defendant as hereinafter set out, your orator brings this suit.

### XIII.

And now your orator further shows to the Court that it now owns and operates lines of telephone extending from the City of Chamberlain on the West through the City of Mitchell to the Cities of Marshall and Heron Lake in the State of Minnesota on the East, and from the Cities of Edgely, Lamour and Oakes, North Dakota on the North through the City of Mitchell to the City of Running Water in the State of South Dakota on the South.

That at certain of its Eastern terminals in the State of Minnesota your orator's lines of telephone connect with the lines of the Northwestern Telephone Company, so that patrons in South Dakota as far West as Chamberlain can, by use of the lines extending through the City of Mitchell, and do almost daily, communicate with persons at cities and towns situated in Minnesota by use of the lines extending through the City of Mitchell.

That your orator is continuously engaged in transmitting over its said lines of telephone and delivering messages from persons in the State of South Dakota to persons in the States of Minnesota, North Dakota, Iowa, and Nebraska, and is continuously engaged in transmitting over its said lines of telephone and delivering messages from persons in said States of Minnesota, North Dakota, Iowa and Nebraska to persons in South Dakota. That the tolls for such interstate communication amount to more than Four Thousand Dollars a month.

That since the establishment of said telephone exchange and telephone lines in the City of Mitchell, your orator entered into a contract with the United States Government whereby your orator daily received from the United States Weather Bureau at Huron, South Dakota, and transmits and delivers the messages of the officers of the United States forecasting the weather; such messages being delivered to thirty-two cities and towns situated on your orator's lines in South Dakota. That in said contract it is also provided that your orator shall receive, transmit, and deliver to all its stations and patrons in South Dakota, messages giving special warning of weather conditions whenever such special messages shall be issued by the officers of the government.

That your orator also furnishes telephones and telephone service to all officers of the United States Government at cities and towns where such officers are stationed, as well as at the several Indian Agencies situated at Ft. Yates, North Dakota, Cheyenne Agency, Yankton Agency and the Sisseton Agency in South Dakota.

That the telephone lines extending North and South through the City of Mitchell, and extending East and West through the City of Mitchell are main or trunk lines over which

a large part of such interstate and government business is transmitted.

That any interference, such as now threatened by the defendant as hereinafter set forth, with the said telephone exchange and telephone lines of your orator in and passing through the City of Mitchell will damage, hinder, and interfere with your orator in the transmission of its said interstate business, and in rendering the said service to the United States Government, to the great and irreparable damage of your orator. That to the end that your orator may not be so damaged, hindered, and interfered with in the transmission of said interstate and government business your orator seeks the relief hereinafter prayed for.

#### XIV.

That said defendant, the City of Mitchell, ignoring and disregarding the vested right of your orator to right of way over the streets and alleys and highways of the State of South Dakota, granted your orator by the State of South Dakota, and disregarding and ignoring the vested right of your orator to right of way over the streets and alleys of the City of Mitchell now occupied by your orator's telephone and exchange lines, secured to and vested in  
23 your orator by virtue of the consent of said City to the original construction of said telephone and exchange lines by your orator and your orator's grantors and assignors, and ignoring and disregarding the laws of the United States and the right of your orator and your orator's grantors and assignors, and ignoring and disregarding the laws of the United States and the right of your orator thereunder to peaceably and orderly pursue without disturbance or interference, its business of receiving, transmitting and delivering interstate communications over its said telephone lines and exchange in said City of Mitchell, as well as the receiving, transmitting and delivery of the messages and communications of the United States Government, its officers and agents, as hereinbefore described and set forth, and pretending and assuming that it has a right to direct, command and enforce the removal of your orator's telephone lines and exchange from the City of Mitchell and from the streets and alleys therein, and further assuming and pretending that any rights which your orator may have had to maintain its said telephone lines and exchange in the City of Mitchell will expire on the 11th day of May, 1913, and further assuming and pretending that it has a right to terminate your orator's right to maintain its said telephone lines and exchange in the City of Mitchell, did on the 17th day of March, 1913, by its City Council in regular session assembled, pass, adopt and publish the following ordinances or resolution:

24

#### Telephone Resolution.

Whereas, the Dakota Central Telephone Company is maintaining, conducting and operating a local telephone system or exchange

in the city of Mitchell, County of Davison, South Dakota, under the rights and privileges granted in, and in accordance with the terms and conditions of Ordinance No. 135 of the City of Mitchell, South Dakota being an ordinance entitled, "An Ordinance Granting to F. B. Elce, His Associates, Heirs and Assigns Use of the Streets, Alleys and Public Grounds of the City of Mitchell, S. D., for the Erection and Maintenance of a Public Telephone System," and adopted the 11th day of May, 1898; and,

Whereas, the rights and privileges granted by said Ordinance No. 135, by virtue of the limitation therein contained, will cease and terminate on the 11th day of May, 1913; and,

Whereas the Dakota Central Telephone Company has failed and refused to accept the terms and conditions of Ordinance No. 305 of the City of Mitchell, S. D., granting to the said Dakota Central Telephone Company the privilege to conduct, maintain and operate a local telephone system or exchange in the city of Mitchell, S. D., for a period of 20 years from and after the said 11th day of May, 1913; and,

Whereas the said Dakota Central Telephone Company has no other rights than those granted by said Ordinance No. 135, to construct, maintain and operate a local telephone system or exchange in the city of Mitchell, South Dakota; and,

25 Now therefore, be it hereby resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled duly and regularly called, this 17th day of March, 1913, that the right and privilege of the Dakota Central Telephone Company, to construct, operate and maintain a local telephone system or exchange in the City of Mitchell, South Dakota, be, and the same are hereby terminated from and after the 11th day of May, 1913; and

Be it further resolved that said Dakota Central Telephone Company shall have no right or privilege to construct, operate or maintain a local telephone system or exchange in the City of Mitchell, South Dakota, from and after the 11th day of May, 1913; and

Be it further resolved that said Dakota Central Telephone Company be, and it is hereby notified and requested forthwith on the 11th day of May, 1913, to remove from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota; and,

Be it further resolved that said Dakota Central Telephone Company be, and it is hereby notified and required that in case said company fails, neglects or refuses to comply with the provisions of this resolution and to remove from the streets, alleys, avenues  
26 and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota, as herein required, then the City Council



of the City of Mitchell, South Dakota, will take such steps as may be necessary to secure the immediate removal of said poles, wires, cables, fixtures and apparatus from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota; and,

Be it further resolved that a copy of this resolution be served upon said Dakota Central Telephone Company, by sending a copy of same by registered mail to J. L. W. Zeitlow, the President of said Company at Aberdeen, South Dakota, and that the City Auditor of the City of Mitchell, South Dakota, is hereby directed to forthwith mail a copy of this resolution by registered mail to said J. L. W. Zeitlow in accordance herewith; and,

Be it further resolved that the mailing of a copy of this resolution by the City Auditor to the president of said company as herein required, and the receipt of such copy by said president shall constitute notice to said Dakota Central Telephone Company of the contents of this resolution and of the intention of the City Council, of the City of Mitchell, South Dakota, relative to the matter herein contained.

27 Adopted and approved this 17th day of March, 1913.

A. E. HITCHCOCK, *Mayor*.

Attest:

N. H. JENSEN,  
*City Auditor.*

That at the same meeting said City Council adopted, and the Mayor approved two other resolutions as follows:

#### Telephone Resolution.

Whereas the right of the Dakota Central Telephone Company to construct, maintain, and operate a local telephone exchange or system, in the city of Mitchell, South Dakota, will cease and terminate on the 11th day of May, 1913; and,

Whereas the City Council of the City of Mitchell, South Dakota, and the said Dakota Central Telephone Company have failed to agree upon the terms and conditions upon which the said company might continue to operate and maintain a local telephone exchange or system in the City of Mitchell, South Dakota, from and after the said 11th day of May, 1913; and

Whereas the City Council of said city is desirous of protecting its rights in said matter.

Now therefore, to protect its said rights and to avoid waiving said rights,

Be it resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled, duly and regularly called this 17th day of March, 1913, that all the officers and employees of the said City of Mitchell, South Dakota, be, and they are hereby directed and requested not to contract, either directly or indirectly, with the Dakota Central Telephone Company, for any local telephone service

28 from said company in the city of Mitchell, South Dakota, from and after the 11th day of May, 1913, until the controversy now existing between said city and the company have

been adjusted, and they are further directed and requested to terminate, on the said 11th day of May, 1913, all relation existing on that date, between them and the Dakota Central Telephone Company relative to local telephone service furnished by said Dakota Central Telephone Company, in said city of Mitchell, South Dakota.

Adopted and approved the 17th day of March, 1913.

A. E. HITCHCOCK, *Mayor*.

Attest:

N. H. JENSEN,  
*City Auditor*.

### Fire Alarm Resolution.

Whereas the right of the Dakota Central Telephone Company to construct, maintain and operate a local telephone system or exchange in the City of Mitchell, South Dakota, ceases and terminates on the 11th day of May, 1913; and,

Whereas the said Dakota Central Telephone Company has heretofore furnished the City of Mitchell, South Dakota, all necessary fire alarm service.

Now therefore, be it resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled, duly and regularly called, that the City of Mitchell, South Dakota, purchase and install a fire alarm system for said city of Mitchell, South Dakota, to be used from and after the 11th day of May, 1913; and,

29 Be it further resolved that the city engineer of the City of Mitchell, South Dakota, be and he is hereby authorized and directed to prepare plans and specifications for a complete and adequate fire alarm system for the City of Mitchell, South Dakota, and to report said plans and specifications as soon as completed, to the city council of the City of Mitchell, South Dakota.

Adopted and approved this 17th day of March, 1913.

A. E. HITCHCOCK, *Mayor*.

Attest:

N. H. JENSEN,  
*City Auditor*.

### XV.

That said defendant caused a copy of said resolutions first above set forth in Paragraph XIV, hereof, to be served on the complainant, and now threatens that if complainant does not remove its said telephone lines and exchange from the City of Mitchell, on May 11th, 1913, and cease to operate said telephone exchange and lines on said date said defendant will proceed to remove the poles and wires from the streets and alleys of said city, and further threatens that it will disconnect the telephones of complainant's subscribers in said City by cutting the wires connecting such telephones with complainant's telephone exchange. And your orator alleges that the defendant, the City of Mitchell, will, unless restrained



and enjoined by this Honorable Court, proceed to cut down, remove and disconnect the said telephone poles, lines, wires and telephones, and remove the same from the *the* streets and alleys of said City all to the great and irreparable damage of this complainant.

30

## XVI.

And your orator further alleges and shows to the Court that the said ordinance or resolution so passed, adopted and published by said City on March 17th, 1913, was expressly intended to apply, and does in fact apply to your orator alone, and was passed, adopted and published with a view of permitting, authorizing and directing the officers and agents of said defendant city, under the guise and form of law, to cut down, remove, destroy, and ruin your orators said telephone lines and exchange so situated within said City, and with a view of preventing, hindering and obstructing your orator in the further enjoyment of the rights and franchises granted your orator by the State of South Dakota, and with a view of obstructing, hindering and interfering with your orator in the transmission of its interstate business over its said telephone lines in and through said City.

And your orator further shows to the Court that said defendant claiming and pretending that the said ordinance or resolution of March 17th, 1913, is a valid and lawful ordinance or resolution and within the powers conferred upon said City by the laws of the State of South Dakota, intend to further enforce the same by preventing your orator from operating, extending or renewing its said telephone lines and exchange within said City and threatens to prevent by force, as well as by divers and sundry legal proceedings, your orator and its officers, agents and servants from operating, extending and renewing its said telephone lines and exchanges so situated within said City, and thereby involve your orator in a multiplicity of suits.

31

## XVII.

Your orator further shows to the Court and alleges that it has done all things required of it by the State of South Dakota to vest it, and it is now vested with a contract and property rights as well as franchises which entitle your orator to the right of way for its telephone lines over the streets and alleys and highways of the State of South Dakota, and that your orator and its grantors and assignors have done all things necessary to be done to secure and have heretofore secured the consent of the said city of Mitchell to use and occupy for telephone purposes all the streets and alleys of said City now occupied by your orator's lines of Telephone and telephone exchange. That your orator has at all times complied fully and faithfully with every regulation and requirement of said City of Mitchell, concerning the occupancy of said streets and alleys in said City for said telephone purposes, and that your orator has not done or neglected to do anything in violation of any re-

quirement or regulation of said city in the premises wherein or whereby your orator should be held to the forfeiture of any of its rights or franchises in and to the occupancy of the said streets and alleys in said City for said telephone purposes.

## XVIII.

And your orator further shows and alleges that the value of its telephone lines and exchanges situated in said City of Mitchell is at least the sum of One Hundred and Ten Thousand Dollars, and that the threatened removal and destruction thereof by the said defendant would damage your orator in its property in at least the sum of One Hundred and Ten Thousand Dollars beside the damage occasioned to your orator by being deprived of its said franchise and privileges granted it by the State of South Dakota, and beside the damage your orator would suffer by being obstructed in the dispatch and transmission of its said interstate business, and that therefore the amount in dispute in this cause, exclusive of costs, is at least the sum of One Hundred and Ten Thousand Dollars.

## XIX.

That said Ordinance set out in Paragraph XIV, hereof, has the force and effect of a law of the State of South Dakota within the intent and meaning of Section Ten of Article One, of the Constitution of the United States. That said Ordinance so construed as a law of the State of South Dakota is a law impairing the obligation of contracts and as such will and does impair the obligation of the contracts arising between the complainant, and the State of South Dakota, and the City of Mitchell, by reason of the granting to the complainant its Charter Rights, including the right to occupy the streets, alleys, highways and public grounds of the State for telephone purposes, and the consent of the City of Mitchell to the construction of the telephone exchange and lines in the City of Mitchell, and the acceptance of such rights and privileges by complainant and by the construction of said telephone exchange and lines within the City of Mitchell, all to the great and irreparable damage of the complainant.

33

## XX.

Your orator further alleges that the value of the telephone exchange and lines situated in the City of Mitchell, consists largely in the labor of installing the poles, wires and other apparatus. That if such telephone exchange and lines are taken down and dismantled, the salvage will be nominal, and the greater part of the value of such exchange, and lines will be destroyed. That to enforce said Ordinance of March 17th, 1913, and remove or cause to be removed, or to require the complainant to remove its said telephone exchange, lines, poles and wires from the streets and alleys

of said City, will deprive complainant of its property in said telephone exchange and lines without due process of law, and will amount to a confiscation, thereof, in violation of the Fifth Amendment to the Constitution of the United States.

## XXI.

Your orator further shows to the Court and alleges that the wrongs done and threatened to be done your orator by the Defendant as hereinbefore alleged will impair your orator's contract, property, rights and franchises vested in your orator by the State of South Dakota and consented to by the said City of Mitchell, and hereinbefore alleged, and will deprive your orator of such contract, property, rights, and franchises, without due process of law, and will obstruct and interfere with your orator in the dispatch and transmission of its said interstate business in violation of the constitution and laws of the United States and of the Act of Congress regulating interstate commerce.

34

## XXII.

Your orator further alleges that for the protection and preservation of its contract, property, rights, and franchises so vested in it and the protection of your orator in the peaceable and orderly dispatch and transmission of its said interstate business against the wrongs done and threatened to be done by the defendant, your orator is without remedy save in a Court of equity where matters of this kind are properly cognizable and relievable.

Now, therefore, to the end that your orator may obtain the relief to which it is justly entitled in the premises, your orator prays the Court to grant it due process by subpoena, directed to said City of Mitchell, defendant hereinbefore named, requiring and commanding it to appear herein and answer, but not under oath, the same being expressly waived, the several allegations in this your orator's bill contained. And your orator further prays that upon the final hearing it be ordered and decreed that the said ordinance or resolution passed and adopted by the City Council of said City of Mitchell, on March 17th, 1913, was not within the power of the said City Council, without authority of law, unconstitutional and void and granting your orator a writ of injunction to be issued out of and under the seal of this Honorable Court, enjoining and restraining the defendant, City of Mitchell, its officers, agents, attorneys, and servants from in any manner enforcing or attempting to enforce the

35 said Ordinance or resolution against your orator, or from maintaining suit against your orator, the object or purpose of which shall be to enforce said ordinance or resolution. And further enjoining and restraining the defendant, City of Mitchell, its officers, agents, attorneys and servants from in any manner, other than by exercise of lawful police power, interfering with the poles, telephone lines and telephone exchange of your orator now situated in said City of Mitchell, and particularly enjoining them from cut-

ting down, removing, destroying or in any manner impairing or damaging the said telephone poles, lines and exchange so owned and operated by your orator in said City of Mitchell, or in any manner obstructing or interfering with your orator's telephone lines and facilities situated in said City used by your orator in the handling of interstate business originated in or passing through said City.

And your orator prays that a provisional or preliminary injunction may be issued, restraining and enjoining the defendant in each of the particulars aforesaid, and that your orator may have such other and further relief as may be just and equitable.

And for this your orator will ever pray.

DICK HANEY,  
T. H. NULL,  
*Solicitors for Complainant.*

NULL & ROYHL,  
SPANGLER & HANEY,  
*Of Counsel.*

36 STATE OF SOUTH DAKOTA,  
*County of Davison, ss:*

W. G. Bickelhaupt being first duly sworn on oath says:

That he is the Secretary of the complainant, Dakota Central Telephone Company, and makes this verification in its behalf.

That he has read the foregoing Bill of Complaint, and knows the contents thereof.

That the same is true, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

W. G. BICKELHAUPT.

Subscribed and sworn to before me this 24 day of March, 1913.  
[NOTARIAL SEAL.] WM. McGRATH,

*Notary Public.*

(Endorsed:) No. 5 Eq. S. D. United States District Court, District of South Dakota, Southern Division. Dakota Central Telephone Co. vs. The City of Mitchell. Bill in Equity. Null & Royhl, Spangler & Haney, Attorney- for Complainant. Filed March 25, 1913. Oliver S. Pendar, Clerk.

And, to-wit: on the same day, there was issued out of the office of the clerk of said court, Equity Subpœna; which said Equity Subpœna, together with the Marshal's return of service endorsed thereon, is in words and figures the following, to-wit:

37 UNITED STATES OF AMERICA,  
*Southern Division of the  
District of South Dakota:*

The President of the United States of America to the City of Mitchell, a Municipal Corporation, Greeting:

You are hereby commanded to be and appear and file your answer, or other defense, in the office of the Clerk of the District

Court of the United States, for the District of South Dakota, at the City of Sioux Falls, to answer the Bill of Complaint of Dakota Central Telephone Company, a corporation organized under and by virtue of the laws of the State of South Dakota, filed against you on the 25th day of March, A. D. 1913, this subpoena is returnable into the said Clerk's office twenty days from the date hereof; hence fail not.

Witness: the Hon. James D. Elliott, Judge of the District Court of the United States, for the District of South Dakota, this 25th day of March, A. D. 1913. Issued at my office in the city of Sioux Falls, under the seal of said District Court, the day and year last aforesaid.

[SEAL OF COURT.]

OLIVER S. PENDAR, *Clerk*.

MEMORANDUM.—The above named defendant is required to file its answer or other defense in this suit in the Clerk's office aforesaid, on or before the twentieth day after service of this subpoena upon it, excluding the day of service thereof, otherwise the bill  
38 may be taken pro confesso.

[SEAL OF COURT.]

OLIVER S. PENDAR, *Clerk*.

Messrs. NULL & ROYHL AND

Messrs. SPANGLER & HANEY,

*Plaintiff's Solicitors.*

UNITED STATES OF AMERICA,

*District of South Dakota, ss:*

I hereby certify and return that I served the within Chancery Subpoena; together with the Bill in Equity and Order to show cause in said action, on the therein-named City of Mitchell, a municipal corporation, at Mitchell, S. D., on the 27th day of March, A. D. 1913 by handing to and leaving with A. E. Hitchcock, Mayor of said City of Mitchell, S. D., certified copies thereof.

SETH BULLOCK,

*United States Marshal,*

By H. F. CHAPMAN, *Deputy.*

(Endorsed:) No. 5 Equity, S. Div. United States District Court, District of South Dakota, Southern Division. Dakota Central Telephone Company, a corporation, Plaintiff, vs. The City of Mitchell, a municipal corporation, Defendant. Equity Subpoena. Returned and filed this 28th day of March, A. D. 1913. Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

39 And afterwards, to-wit: on the 10th day of May, A. D., 1913, there was filed in the office of the clerk of said court, Answer: which said Answer, omitting Exhibits A, B, C and D attached thereto, is in words and figures the following, to-wit:

District Court of the United States, District of South Dakota,  
Southern Division.

Equity. No. 5 Eq.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation, Plaintiff,  
vs.

CITY OF MITCHELL, a Municipal Corporation, Defendant.

*Complaint of the City of Mitchell, Defendant, to the Bill of Complaint  
of the Dakota Central Telephone Company, Plaintiff, in the  
above-entitled Suit.*

Admits that plaintiff is, and since August 30th, 1904, has been  
a corporation organized under the laws of South Dakota, as alleged  
in the first paragraph of said Bill; that it is known as a Telephone  
Company and a common carrier; that it has acquired certain lines  
for telephone and telephone exchanges, and has been engaged as a  
common carrier in rendering telephone service and transmitting tel-  
e- phone messages and communications for the general public between  
cities, towns and villages and districts in and to which it has  
acquired one lines and exchanges.

As to whether it has rendered such service to the general public  
on equal terms without discrimination throughout and between said  
cities, towns, villages and districts, the defendant is without knowl-  
edge.

The defendant is also without knowledge as to whether  
the plaintiff is actively engaged in the operation of telephone  
exchanges in about eighty-five cities and towns and has two hundred  
and fifty telephone stations other than exchanges in the States of  
South Dakota, North Dakota and Minnesota, and as to whether said  
cities, towns, villages and telephone exchanges are connected by tele-  
phone lines operated by plaintiff. Defendant is also without knowl-  
edge as to whether said telephone system consists of about eighty-  
five telephone exchanges, about two hundred sixty-five stations, and  
about five thousand miles of telephone line outside of said cities  
and towns. Also as to whether in the construction, purchase and  
operation of said telephone lines, exchanges and stations plaintiff  
has expended Two Million Dollars, or any other sum.

The defendant expressly denies that the plaintiff acquired the  
right-of-way for telephone purposes over the public grounds, streets,  
avenues and highways within the defendant city under the provisions  
of Section 554 of the Code of Civil Procedure, and avers that any  
lines acquired by plaintiff for telephone purposes within said City  
were acquired solely under and by virtue of the ordinances passed  
by said City and referred to in said Bill as ordinance number 135,  
ordinance number 174 and ordinance number 180, set out in said  
Bill; that subject to the express terms and conditions of said  
ordinances and the rights expressly granted thereby, the  
defendant has during all of the times mentioned in said bill  
of complaint had and exercised the exclusive control over its

streets, avenues, alleys, highways and public grounds, and still retains such exclusive control thereof.

## II.

The defendant admits that it is, and during the times mentioned in said complaint was, a municipal corporation situate in Davison County, South Dakota.

## III.

Defendant admits the passage and approval of ordinance number 135, set out in the third paragraph of said bill of complaint, on the 11th of May, 1898, and that under the terms and provisions thereof the said F. B. Elce installed a local telephone system in the defendant city and owned and operated the same as a local telephone exchange until June 1, 1904, and denies that he owned and operated the same later than that date, or that he used the streets, alleys, highways and public grounds of said city with poles, wires and fixtures hereafter.

## IV.

Answering the fourth paragraph of said bill defendant denies that the Dakota Central Telephone lines in any manner applied to the defendant City for its consent to construct a telephone system therein about March, 1904, but it admits the passage and approval of ordinance number 174 on or about March 21, 1904, as alleged in said paragraph, and admits that the same was duly published.

## 42

## V.

Answering the fifth paragraph of said complaint, the defendant denies any knowledge that said ordinance number 174 was found to be insufficient for the purposes of said Dakota Central Telephone lines, but admits that about June 7, 1904, ordinance number 180, as set out in said fifth paragraph, was duly passed, approved and published.

Further answering the said fifth paragraph, the defendant avers that about the time said ordinances numbered 174 and 180 were passed and approved, as aforesaid, said Dakota Central Telephone lines acquired the long distance telephone lines then running into the defendant City, then owned and operated by the Dakota Southern Telephone Company, but that said Dakota Southern Telephone Company had no franchise, consent or permission from the defendant City to construct, maintain or operate a long distance telephone line, or lines, within said City, and that the said ordinances numbered 174 and 180 were passed and approved in pursuance of the application of said Dakota Central telephone lines to said city for permission to construct and operate a long distance telephone line within and through said city. That said ordinance did not give to the said Dakota Central Telephone lines the right to construct or



operate a local telephone exchange within said City, but gave to said Dakota Central telephone lines only the right to construct and maintain a long distance telephone line within and through said City, and that the City did not, and never has, granted to the Dakota Central telephone lines, through said ordinances numbered 174 and 180, or otherwise, the right to construct, operate or maintain a local telephone exchange within said city.

## VI.

Answering the sixth paragraph of said Bill, the defendant admits that prior to the adoption of said ordinances numbered 174 and 180 the Dakota Southern Telephone Company had constructed certain long distance telephone lines between the defendant city and certain other cities in South Dakota, but denies that said Dakota Southern Telephone Company had secured the consent of said City to construct or operate the same; and denies that the instruments in use in telephone exchanges and in the city of Mitchell were instruments that could not be used successfully for long distance messages; admits that improved telephone instruments had been devised for long distance messages, but denies that such instruments were only supplied to subscribers by special agreement with individual subscribers who desired instruments efficient for long distance and local messages. The defendant is without knowledge as to whether the art of telephony had so advanced that the public was demanding the installment of long distance telephones in local exchanges, and expressly denies that the Dakota Southern Telephone Company had acquired any right from the City of Mitchell to install or operate any telephone lines or system therein whatsoever or that it was operating a system of toll lines, as alleged in said paragraph.

## VII.

Answering the seventh paragraph of said complaint, the defendant admits that on or about May 25th, 1904, the Dakota Central Telephone Lines entered into a contract with the said F. B. Elce for the purchase from said Elce of the property of the Mitchell telephone exchange, then owned and operated in said city by him, but denies that it relied upon the consent of the defendant city as expressed in said ordinance number 174, or otherwise expressed. That the defendant is without knowledge as to whether, after entering into said contract with said Elce, said Dakota Central Telephone Lines discovered the insufficiency of said ordinance numbered 174 and applied to said city for the passage of ordinance numbered 180, or that it completed the purchase of said telephone exchange after the passage of ordinance numbered 180, but admits that after the passage of said ordinance said Dakota Central Telephone Lines on or about October 2nd, 1904, conveyed said telephone exchange, together with other exchanges, lines and properties including rights and franchises owned by it, to the plaintiff herein.



## VIII.

The defendant admits the allegations of the eighth paragraph of said bill of complaint.

## IX.

Answering the ninth paragraph of said Bill, the defendant denies that it desired the installation of the automatic telephone system in said city, and it is without knowledge as to whether, in order to install such system, it was necessary to put in permanent underground ways in which to place the wires and cables and otherwise install said system, and it denies that it passed an ordinance such as is set out in said paragraph.

45 It avers, however, that about April 10th, 1907, the City Council of said city passed a resolution as follows:

"Be it resolved, by the City Council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, their successors or assigns, to place, construct and maintain through and under the streets and alleys and public grounds of said City all conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public in general communication by telephone, and other improved appliances."

That said resolution was not in the form of an ordinance, nor passed and approved as such, but that it was a resolution and as such intended only to give the permission of said city to plaintiff subject to all of the conditions and provisions of said ordinance numbered 135, to place its wires and cables underneath the streets and alleys of said city, in order to avoid encumbering such streets and alleys in the congested portions thereof, and to protect said appliances from accident and from the elements; defendant denies that such permission was granted or that said resolution was adopted for the purpose to enabling plaintiff to install an automatic telephone system in said city or to extend the rights and privileges of the plaintiff within said city beyond the express terms and conditions of said ordinance numbered 135, except as herein stated.

## X.

Answering the tenth paragraph of said complaint, the defendant is without knowledge as to whether after the adoption of said resolution of April 10th, 1907, plaintiff began to reconstruct and

46 extend its telephone exchange in said city, or that it undertook under a definite plan to place its wires in the business district of said city underground with the plan of finally installing an automatic telephone system. Defendant admits that during the latter part of 1912 plaintiff installed an automatic telephone system in said city, and that the same is now largely in operation therein, but denies that the defendant in any manner consented to or encouraged the installation of said automatic system. The defendant admits that the plaintiff has erected an exchange building within

said city, but is without knowledge as to whether the same is fire-proof, or the costs thereof, or as to whether the same is in successful operation, and denies that it is the most efficient system known to the art of telephony, and that automatic telephones are in efficient use in local and long distance conversations therein. Defendant is without knowledge as to whether eleven hundred subscribers to said automatic telephone system, or any other number, are in direct communication with persons at the exchanges and stations of plaintiff's system in South Dakota, or elsewhere, as alleged in said paragraph.

## XI.

Answering the eleventh paragraph of said Bill, defendant denies that plaintiff has at all times since it acquired said telephone exchange obeyed the commands, rules and regulations of the defendant in placing its poles, lines and conduits in the streets and alleys of said city, and in the operation of said telephone exchange and toll lines within said city.

47

## XII.

Answering the twelfth paragraph of said complaint, defendant denies that plaintiff has, by reason of any of the things therein alleged or otherwise, acquired a vested right, or any right, to maintain and operate its said telephone exchange and lines within said city beyond the express terms and conditions of said ordinances numbered 135, 174 and 180, and it avers that the right acquired by plaintiff to operate or maintain a local telephone system or exchange within said city will, under the terms and conditions of said ordinance numbered 135, terminate and expire on the 11th day of May, 1913.

## XIII.

Answering the thirteenth paragraph of said complaint, the defendant avers that it is without knowledge as to whether plaintiff now owns and operates lines of telephone as stated therein, or as to the connections therein alleged or the use that can be made of such lines by the patrons of the plaintiff in the State of South Dakota, or elsewhere, and it is without knowledge as to whether plaintiff is engaged in transmitting and delivering messages over its said lines from persons in South Dakota to persons in Minnesota, North Dakota, Iowa, and Nebraska, and in transmitting messages from persons in said States to persons within the State of South Dakota, and it is without knowledge as to the amount of tolls for such services.

48      Defendant is also without knowledge as to the alleged contract between plaintiff and the United States for the transmittal of messages forecasting the weather into the State of South Dakota or to its patrons within said State, or the delivery of special messages issued by officers of the United States. It is also without knowledge as to the allegations of telephone service to the officers of the United States at the several Indian Agencies in said State and

as to whether the telephone lines extending north and south and east and west through the City of Mitchell are main or trunk lines over which a large part of interstate and government business is transmitted, and the defendant denies that the action taken by it seeking to exclude plaintiff from said city after the expiration of its franchise and rights conferred by said ordinance 135 on the 11th of May, 1913 will in any manner damage, hinder or interfere with the transmission of the interstate business of plaintiff in rendering its said service to the United States or to the damage of the plaintiff.

#### XIV.

Answering the fourteenth paragraph of said bill, defendant denies that it has in any manner disregarded or ignored the vested rights of plaintiff to a right-of-way over the streets and alleys within said city now occupied by said telephone exchange and lines, and denies that it has or will ignore or disregard the laws of the United States or of the State of South Dakota, or any of the rights and privileges of the plaintiff thereunder with reference to receiving, transmitting or delivering interstate communications over its said telephone lines and exchanges, or the receiving, transmitting and delivery of messages and communications of the United States to its officers and agents; but avers that its sole purpose in passing the resolutions, copies of which are set out in the thirteenth paragraph of said Bill, was to give the plaintiff due and timely notice of the termination of its rights to operate or maintain a local telephone exchange within said city after the expiration of its rights so to do under said ordinance number 135, and to exclude its said local exchange from said city from and after said date.

Defendant admits the passage of the resolutions, as set forth in said paragraph, but denies that it has in any manner interfered with any of the rights acquired by plaintiff under the said ordinances numbered 174 and 180 to carry on and operate its said long distance telephone business, and denies any intention so to do, except insofar as plaintiff seeks to continue to operate its said local exchange within said city under the pretense that it has a vested right to continue the operation and maintenance thereof as a part of its long distance business, and the defendant expressly denies that plaintiff acquired any right from it by virtue of said ordinance number 135, or otherwise, to maintain or operate its said local exchange from and after May 11th, 1913, under said ordinances 174 and 180.

#### 50

#### XV.

Answering the fifteenth paragraph of said Bill, the defendant admits that he caused a copy of said resolution, set forth in the fourteenth paragraph of said Bill, to be served on the plaintiff, and admits that unless the plaintiff shall comply with the provisions of said resolutions the defendant will take such steps as shall be necessary to remove said poles, wires, fixtures and apparatus from the streets, alleys, avenues and public grounds of said city as may be in use by

the plaintiff in connection with its said local exchange within said city from and after the 11th day of May, 1913.

### XVI.

Answering the sixteenth paragraph of said Bill, the defendant denies that plaintiff is vested with any contract of property rights or franchises which entitle it to the right-of-way for its telephone lines over the streets, alleys and highways of said city, or that plaintiff has in any manner or form secured any consent from said city to construct, maintain or operate a local telephone exchange in said city other than the consent given in said ordinance numbered 135, and denies that plaintiff has at all times complied fully and faithfully with all of the regulations and requirements of said city relative to the occupancy of said streets and alleys for such telephone purposes, and denies that said resolution of March 17th, 1913, was passed, adopted and published with a view of permitting, authorizing or directing the officers and agents of the defendant to cut down, remove, destroy and ruin its telephone lines and exchange with a view of preventing, hindering or obstructing plaintiff in the enjoyment of any of its rights acquired under ordinances 174 and 180, or otherwise, than as hereinbefore stated.

51

### XVII.

Answering the seventeenth paragraph of said Bill, the defendant denies that plaintiff has done all things required of it by the State of South Dakota to vest it, or that it is vested, with any contract or property rights or franchises which entitle it to the right-of-way for its telephone lines over its streets, alleys and highways within said city other than as granted by said ordinances numbered 174 and 180, and denies that plaintiff, by reason of any of the things alleged in said bill or done by it, has secured the consent of said city to use and occupy the streets and alleys of said city for telephone purposes other than in the operation and maintenance of its long distance service under the authority granted by said ordinances 174 and 180. The defendant denies that plaintiff has at all times complied with the regulations and requirements of said city concerning the streets, alleys and avenues for telephone purposes, and avers that all of its rights to the use and occupancy of said streets and alleys for telephone purposes other than for long distance telephone service under said ordinances 174 and 180 will cease and expire on the 11th day of May, 1913, and it will thereafter no longer be entitled to the use or occupancy of said streets and alleys for any other purpose.

### XVIII.

Answering the eighteenth paragraph of said bill, the defendant avers that it is without knowledge concerning the allegations thereof, and that insofar as the same are material the plaintiff should be required to prove the same.

## XIX.

Answering the nineteenth paragraph of said complaint, the defendant denies that said ordinance set out in the fourteenth paragraph of said bill has the force of a law impairing the obligation of any contract between plaintiff and the defendant, and denies that it does in any manner impair any vested rights of the plaintiff by reason of any of the allegations contained in its bill.

## XX.

Answering the twentieth paragraph of said bill, the defendant avers that it is without knowledge of the truth of the allegations of said paragraph, and that insofar as the same are material the plaintiff should be required to prove the same except that defendant denies that said ordinance of March 17th, 1913, will have the effect to deprive plaintiff of its property in said telephone exchange and lines without due process of law, or that it will amount to a confiscation thereof in violation of the fifth amendment of the Constitution of the United States.

## XXI.

Answering the twenty-first paragraph of said bill, the defendant denies that any of the things done or threatened to be done by it will impair any contract between plaintiff and the defendant or any of its property rights or franchises vested in it by the State of South Dakota and consented to by the defendant, and denies that any rights have become vested in plaintiff by virtue of any of the acts of the defendant herein that will in any manner be impaired by any of the things done or threatened by the defendant, as alleged in said paragraph.

## XXII.

Further answering said Bill of Complaint the defendant avers that this is not a controversy between citizens of different states; that plaintiff and defendant are both citizens of the State of South Dakota; that the matters in controversy do not arise under the constitution or laws of the United States; that it appears upon the face of the bill of complaint that the determination of the rights of the respective parties do not involve any title, right, privilege, or immunity conferred by the constitution or laws of the United States, or that will be defeated by a construction of the constitution or laws of the United States, and the suit does not arise under any law regulating interstate commerce, and this court is wholly without jurisdiction to hear, try or determine any of the issues involved herein.

## XXIII.

Defendant further answering states that on or about the 11th day of May, 1898, its City Council passed and adopted said ordi-

nance number 135, and caused the same to be duly published; that pursuant thereto the said F. B. Elce constructed, operated and maintained a local telephone exchange in the defendant city under and in accordance with the terms and conditions of said ordinance until about the 1st day of June, 1904; that on or about the 25th day of May, 1904, the said Elce contracted to sell said local telephone exchange and all his rights to construct and maintain such exchange to the Dakota Central Telephone Lines; that in pursuance of said contract the said Elce, on the 3rd day of June, 1904, made, executed and delivered to the said Dakota Central Telephone  
54 Lines a Bill of Sale, a true copy of which is as follows:

"Bill of Sale.

Whereas, F. B. Elce, of Mitchell, Davison County, South Dakota, for and in consideration of the sum of Eighteen Thousand (\$18,000.00) Dollars, to be paid by the Dakota Central Telephone Lines, a corporation, of Aberdeen, South Dakota, according to terms as set forth in a certain contract, dated May 25th, 1904, has sold and by these presents does grant, bargain, sell, convey, assign, transfer, and deliver to the said Dakota Central Telephone Lines, its successors and assigns, the following described property, to-wit:

The Telephone Exchange located in the City of Mitchell, S. D. known as the Mitchell Telephone Exchange, consisting of Two (2) 200 Cabinet Eureka Express Switch boards with 370 drops installed together with a distributing rack, lightning arrester and case with all the wires and cables attached thereto and strung on poles located in the city of Mitchell, S. D., together with about four hundred (400) telephones connected therewith. All of the said telephones being located within the said city of Mitchell, S. D.; also all poles and fixtures on which the aforesaid wires and cables are strung and all poles, supplies, telephones, tools and appurtenances of whatsoever nature, belonging to the said Telephone Exchange, together  
55 with all the rights and privileges that have been acquired by the said F. B. Elce from the erection and operation of the aforesaid Telephone exchange; also to transfer by warranty deed the following described real estate, lots five (5) and six (6) in block eleven (11), in M. H. Rowley's addition to the city of Mitchell, S. D.; and the said F. B. Elce does guarantee to deliver all of the above described property to the Dakota Central Telephone Lines free and clear of all incumbrances whatsoever. And the said F. B. Elce does vouch himself to be the true and lawful owner of the property and effects hereby sold and to have in himself full power and good right and lawful authority to dispose of the aforesaid property in the manner as aforesaid. And I do for myself, my heirs, executors and administrators hereby covenant and agree to defend title of the aforesaid property, as hereinbefore described, to the Dakota Central Telephone Lines, their heirs, executors, administrators and assigns against the lawful claims and demands of all persons whomsoever.



In witness whereof, I, the said E. B. Elce, have hereunto set my hand and seal this 3rd day of June, 1904.

F. B. ELCE."

O. L. BRANSON.

L. J. WELCH.

That said Bill of Sale was filed in the office of the Register of Deeds of Davison County, South Dakota, on the 6th day of July, 1904; that in pursuance of said contract and Bill of Sale the  
56 said Elce, on or about the 1st day of June, 1904, delivered possession of said local telephone exchange and all his rights thereunder to said Dakota Central Telephone Lines, and that by said purchase and conveyance the said Dakota Central Telephone Lines succeeded to all the rights and privileges granted in said ordinance number 135, and became bound by all the terms, duties, obligations and conditions of said ordinance.

That the said Dakota Central Telephone Lines owned and operated said local telephone exchange in said city under and in pursuance of the terms and conditions of said ordinance number 135, until on or about the 2nd day of October, 1904, at which time it sold and conveyed the same to the plaintiff, with all the properties, rights and franchises then owned by said Dakota Central Telephone Lines, and that plaintiff by virtue of such sale and conveyance became the owner of all the rights and privileges granted in said ordinance number 135, and became bound by all the terms, duties, obligations and conditions thereof.

That since October 2nd, 1904, plaintiff has been, and it now is, the owner of said local telephone exchange, and has since said date operated and now is operating the same under and in accordance with the terms and conditions of said ordinance number 135.

#### XXIV.

That the plaintiff herein for a long time after the purchase of said local telephone exchange and the passage and adoption of ordinances numbered 174 and 180 made no claim that its said local exchange was not maintained and operated under the terms  
57 and conditions of said ordinance number 135, or that said ordinance was in any way repealed, superseded or modified by said ordinances numbered 174 and 180, or that said plaintiff was operating and maintaining said local telephone exchange under said ordinances. But that on the contrary the said plaintiff has complied with all the terms, conditions and obligations of said ordinance number 135 except as hereinafter stated; that ever since the plaintiff has owned and operated said local telephone exchange the annual gross receipts of said telephone exchange for each of said years have exceeded the sum of \$2,400.00, and the plaintiff has voluntarily and without objection paid to the defendant city ten per cent of the said annual gross receipts above \$2,400.00, as required by Section 4 of said ordinance number 135, up to and including the years ending May 31st, 1910, except for the

years 1907 and 1908, which gross earnings charges were paid by said plaintiff under a judgment of the Circuit Court of Davison County, South Dakota, and of the Supreme Court of the State of South Dakota; that during all of said time the said plaintiff has furnished to the defendant city three telephones free of charge, as required in Section 4 of said ordinance number 135; that plaintiff has at all times complied with Section 3 of said ordinance number 135, relative to the rates to be charged by said plaintiff for telephone service in said local telephone exchange; that during the past five years the plaintiff has frequently negotiated with the defendant city for a renewal or extension of its said franchise to maintain and operate its said local telephone exchange in said city from  
58 and after the 11th day of May, 1913, and the said plaintiff has made application to said defendant city for such renewal or extension, but the same has not been granted by said defendant city; that both the plaintiff and the defendant herein have at all times treated and construed said ordinance number 135 as in full force and effect and as the franchise or consent of said city under which the said plaintiff was operating and maintaining its said local telephone exchange in said city of Mitchell, and that said ordinance number 135 has in no way been repealed, superseded or modified by said ordinance numbered 174 and 180, or by the resolution of April 10th, 1907, heretofore set out, or otherwise.

Defendant further answering plaintiff's bill of complaint, and particularly the allegations of paragraphs nine and ten thereof, states that the plaintiff did not notify the defendant or any of its officers that said plaintiff desired to install an automatic telephone system in said city of Mitchell until a short time before said system was installed and that plaintiff at all the time during the time it was making said improvements set out in said paragraphs knew that the defendant city insisted that the plaintiff's franchise to maintain and operate a local telephone exchange in said city was embodied in and conferred by said ordinance number 135, and that said franchise would expire on the 11th day of May, 1913, unless otherwise renewed or extended, and that the defendant would require said plaintiff to remove from the streets, avenues, alleys and  
59 other public grounds of said city all the fixtures and appliances used by said plaintiff in operating and maintaining its said local telephone exchange, on the said 11th day of May, 1913, and that with full knowledge thereof the plaintiff continued to make said improvements and that the same was so done by plaintiff with the purpose of forcing the defendant to grant plaintiff a renewal or extension of said franchise to maintain and operate a local telephone exchange in said city; that in the early part of the year 1913, the plaintiff attempted to force said automatic telephone system into the city of Mitchell regardless of the wishes of the municipal authorities of said city, by securing the consent of the individual citizens thereof to the installation of such telephones in the respective homes and business places of said citizens, and that immediately upon learning of such attempt the City Council of said city, on the 26th day of March, 1912, passed and adopted two



separate resolutions defining the attitude of said City Council and the defendant city in said matter; that true copies of said resolutions are as follows, to-wit:

"Whereas, the franchise of the Dakota Central Telephone Company to use the streets, alleys and public grounds in the City of Mitchell, South Dakota, for the erection and maintenance of a local telephone system, will expire May 11th, 1913, and

Whereas, the present franchise fixes the maximum rates that the Dakota Central Telephone Company may charge for telephone services within said City as follows:

60       \$2.00 per month for business houses, and \$1.25 per month for residence houses, and

Whereas it will be necessary for the City Council of said City soon to grant a new telephone franchise to some company or person and to prescribe the terms and conditions of said franchise, and

Whereas, the City Council of said City now is, and for some time past has been engaged in a controversy with said Dakota Central Telephone Company relative to the rights of the City and the obligations of the Telephone Company regarding telephone matters and also the terms and conditions upon which a new franchise might be issued, and

Whereas, the Dakota Central Telephone Company is now attempting to evade the provisions of the present franchise by contracting with individual subscribers for automatic telephones and for different rates than prescribed in said franchise, &--

Now, therefore, be it resolved by the City Council of the City of Mitchell, South Dakota, in special session duly assembled this 23rd day of March, 1912;

1. That the said City Council considers it a breach of good faith on the part of the Dakota Central Telephone Company to attempt to enter into special contracts with individual citizens of the City of Mitchell relative to the kind of telephones to be installed and the rates to be charged therefor;

61       2. That said City Council considers such action on the part of the Dakota Central Telephone Company as an attempt to circumvent said Council and to force said Council into making an adjustment of said telephone matters with said Company on terms unfair to said City;

3. That said City Council considers that it has the power and authority, under the Constitution of the State and the decisions of both State and Federal Courts to grant telephone franchises in the City upon such terms and conditions as such Council shall deem best including the power to prescribe the kind of telephone service to be furnished and the maximum rates which may be charged therefor;

4. That said City Council considers that any action on the part of individual citizens in contracting with said Dakota Central Telephone Company for the kind of telephone service to be furnished and the rates to be charged therefor, will greatly hamper and embarrass the said City Council in securing the best possible adjust

ment for the City of the telephone problems now confronting said City.

Adopted by the City Council of the City of Mitchell, this 26th day of March, 1912.

[SEAL.]

A. E. HITCHCOCK, *Mayor.*

Attest:

N. H. JENSEN,  
*City Auditor."*

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*Resolution.*

"Whereas, the Dakota Central Telephone Company is attempting to contract with the individual citizens of the City of Mitchell relative to the kind of telephone service to be furnished and the rates to be paid therefor,

Now, therefore, be it resolved by the City Council of the City of Mitchell, S. D., in special session duly assembled this 26th day of March, 1912:

1. That said City Council hereby expressly disavows any consent to, or participation in, any of such contracts or proceedings, either on the part of said Telephone Company or on the part of any of the citizens of said city;

2. That said City Council shall in no manner, either directly or indirectly, expressly or impliedly, be held to consent to, or to have consented to, any agreement or contract by and between said Dakota Central Telephone Company and any of the citizens of said city relative to the kind of telephone service to be furnished the citizens of said City and the rates to be charged therefor;

3. That no contract or agreement made by and between said Dakota Central Telephone Company and any citizen of said city shall in any way be binding upon the City Council of said City, nor shall any such contract or agreement be construed to extend the scope or term of the present telephone franchise under which said Telephone Company is operating, nor to grant a new telephone franchise, nor to grant any additional rights or privileges to said Telephone Company other than the rights and privileges

63 now enjoyed by said Telephone Company under the existing franchise;

4. That said City Council hereby reserved to itself, for the benefit of the whole city, all the rights, powers, duties and authority granted to it by the constitution of the State and confirmed to it by the Courts relative to telephone matter, and said Dakota Central Telephone Company is hereby reminded that the City Council of the City of Mitchell, S. D., is the constitutional body with whom negotiations for a new telephone franchise, or for privileges in relation to the use of the streets and alleys of said City must be conducted;

5. That the City Auditor of the City of Mitchell, S. D., be, and he is hereby instructed to serve a copy of these resolutions upon said Dakota Central Telephone Company by forthwith sending to the President of said Company a copy of these resolutions, by registered mail.

Adopted by the City Council of the City of Mitchell this 26th day of March, 1912.

[SEAL.]

A. E. HITCHCOCK, *Mayor*.

Attest:

N. H. JENSEN,  
*City Auditor.*"

64 That the defendant has never authorized, consented to or required the installation of said automatic telephone exchange or system in said city, but that the same was installed by said plaintiff on its own initiative and without the authority or consent of the defendant.

#### XXV.

Defendant further answering said Bill of Complaint states that the plaintiff now is, and at all times herein mentioned has been, maintaining and operating two separate and distinct telephone systems or exchanges in said city of Mitchell, to-wit: a local telephone exchange whereby the residents of said city are enabled to communicate with each other at a flat rate per month, and a long distance system whereby the residents of said city can communicate by telephone with people residing outside and at a distance from said city, and that said long distance service is paid for according to the distance each message is sent and the length of time it requires to send such message; that said telephone exchanges or systems are entirely separate and distinct from each other; that the local telephone exchange was constructed, and is maintained and operated under the terms and conditions of said ordinance number 135, and the said long distance telephone system was constructed and is maintained and operated under the terms and conditions of said ordinances numbered 174 and 180; that the terms under which the said local telephone exchange has been and is maintained and operated expires on the 11th day of May, 1913, by virtue of the provisions of said ordinance number 135; that the resolutions set

65 out in paragraph 14 of said Bill of Complaint were passed and adopted by the City Council of said City under the terms and conditions of said ordinance number 135, and that said resolutions were intended to apply only to the said local telephone exchange now maintained and operated in said city by plaintiff, and said resolutions do not and were not intended to apply to said long distance telephone system maintained and operated in said city, and the defendant expressly denies any purpose or intention to interfere with or molest the plaintiff in the maintenance and operation of its said long distance telephone system.

#### XXVI.

Defendant, further answering said Bill of Complaint, states that the respective rights of the plaintiff and defendant herein relative to the matter in controversy in this action, and also the validity, scope, effect and construction of Article X, Section 3 of the South

South Dakota Constitution, and Subdivisions 7, 9, 10 and 17, of Section 29 of the Revised Political Code of 1903, of the State of South Dakota, and of Section 554 of the Revised Civil Code of 1903 of South Dakota, and of said ordinance number 135, and of ordinance numbered 174 and 180, and the resolution passed and adopted by the City Council of the City of Mitchell on the 10th day of April, 1907, as set out in paragraphs 4, 5 and 9, respectively, of said Bill

Complaint, have heretofore been fully determined and adjudicated by the Supreme Court of the State of South Dakota, in an action commenced in the Circuit Court of Davison County, South Dakota, on or about the 22nd day of September, 1908, wherein the defendant, City of Mitchell, and A. E. Hitchcock, as Mayor, Clarion D. Hardy, John McDougal, John Michaels, P. H. Kelley, A. A. Truax, Joseph Koch, A. H. Doyle and C. E. Reeves as members of the City Council of the city of Mitchell, South Dakota, were plaintiffs, and the plaintiff herein as defendant. That a true copy of the complaint in said action, marked "Exhibit A", is hereto attached and made a part of this answer; that the said defendant duly served its answer to said complaint in said action, and that a true copy of said Answer, marked "Exhibit B", is hereto attached and made a part of this answer; that the plaintiffs in said action duly served its reply to the counter-claim contained in said answer, and that a true copy of said Reply, marked "Exhibit C", is hereto attached and made a part of this answer.

That on or about the 2nd day of December, 1908, the said action was regularly brought on for trial before the said Circuit Court of Davison County, South Dakota, and the same was duly submitted to said Court without a jury; that thereafter and in due time the said Circuit Court made and filed its findings of fact and conclusions of law therein; that a true copy of said Findings of Fact and Conclusions of Law, marked "Exhibit D" is hereto attached and made a part of this answer, as fully as if the same had been copied herein; that thereafter, on or about the 13th day of December, 1909, rendered a Judgment in said action, a true copy of which is as follows:

### *Judgment.*

"The above entitled cause having been submitted to the Court without a jury and the Court having made and filed its findings of fact and conclusions of law, in which the Court found that the plaintiff was not entitled to recover on the matter sued upon, and that the defendant was not entitled to recover on its counter-claim, and that the defendant was entitled to recover its costs and disbursements in this action.

Now, therefore, on motion of T. H. Null, attorney for defendant, it is,

Ordered and adjudged that the plaintiffs' complaint and the defendant's counter-claim herein be dismissed, and the defendant, the Dakota Central Telephone Company, recover of the plaintiff, the

City of Mitchell, its costs and disbursements in this action, taxed and allowed herein at \$21.50.

Granted December 13, 1909.

By the Court:

FRANK B. SMITH, *Judge*.

Attest:

[SEAL.] S. CATTRELL, *Clerk*.

That thereafter and in due time the plaintiffs in said action appealed to the Supreme Court of South Dakota from that part of said Judgment which adjudged that the plaintiff's complaint therein be dismissed, and that the said defendant recover of the plaintiffs its costs and disbursements in said action.

That thereafter, on the 24th day of May, 1910, the Supreme Court of the State of South Dakota rendered its Judgment in said action, wherein the decision and judgment of the said Circuit Court was reversed, and the said Circuit Court was directed to amend its conclusions of law to correspond with the decision of said Supreme Court, and to enter judgment in favor of the plaintiffs for the amount sued for in said action; that thereafter, on or about the 25th day of October, 1910, the said Circuit Court of Davison County, South Dakota, in accordance with the said direction of said Supreme Court, amended its conclusions of law and entered a judgment in favor of said plaintiffs; that true copies of said amended conclusions of law and judgment are as follows, to-wit:

*Amended Conclusions of Law.*

"This action having been tried at the November Term, 1908, of this Court, before the Court without a jury, and the Court having made Findings of Fact and Conclusions of Law therein, which are of record, and the Court having, on the 13th day of December, 1909, rendered judgment thereon for the defendant and against the plaintiff, for the dismissal of the plaintiffs complaint and for costs to the defendant, and in favor of the plaintiffs against the defendant, for the dismissal of the defendant's counterclaim; and the plaintiffs having duly appealed to the Supreme Court of the State of South Dakota, from that part of said judgment dismissing the plaintiff's complaint and awarding costs to the defendant, and the said Supreme Court having on the 24th day of May, 1910, wholly reversed that part of said judgment appealed from, and the record in this cause having been duly remitted from said Supreme Court to this

Court with directions that this Court amend its conclusions of law to correspond with the opinion of said Supreme Court; and due notice of such remittance having been given to the defendant as appears by the proofs now on file; and due notice of this application for these amended conclusions of law having been given and proof of such notice having been filed;

Now, therefore, in compliance with said mandate of the Supreme Court, and on motion of Lauritz Miller, Attorney for plaintiffs,

the conclusions of law heretofore made and filed in this cause are hereby amended to read as follows:

### I.

That the City of Mitchell had full power and authority to impose a gross earnings or franchise charge as a condition of its consent to erect, construct or maintain Telephone lines and exchanges in the City of Mitchell.

### II.

That that portion of the ordinance of May 11th, 1898, and known as Ordinance No. 138 of the City of Mitchell, South Dakota, which imposes a gross earnings or franchise charge is valid.

### III.

That the ordinance of May 11th, 1898, and known as ordinance No. 135 of the City of Mitchell, South Dakota, was not repealed or modified by the Ordinance of June 7th, 1904, and known as ordinance No. 180 of the City of Mitchell, South Dakota.

### IV.

That the ordinance of May 11th, 1898, and known as ordinance No. 135 of the City of Mitchell, South Dakota, was not modified or repealed by the Resolution adopted by the City Council of the City of Mitchell, South Dakota, on the 10th day of April, 1907.

### V.

That the gross earnings or franchise charge imposed by the ordinance of May 11th, 1898, and known as ordinance No. 135, of the City of Mitchell, South Dakota, is a charge in the nature of a rental fee for the use of the streets and alleys of the City of Mitchell, and is not a tax within the meaning of Section 2125 of the Revised Political Code of South Dakota, of the year 1903, and Chapter 64 of the Session Laws of South Dakota for the year 1907.

### VI.

That the plaintiffs are entitled to recover the amount sued for in this action.

### VII.

That the payment of the gross earnings charges for the years ending May 31st, 1905 and 1906, were voluntarily made by the defendant and that said payments were not made under protest or by reason of threats or under duress.

## VIII.

That the ordinance of May 11th, 1898, and known as ordinance No. 135 of the City of Mitchell, South Dakota, is a binding contract between the City of Mitchell and the defendant herein, the Dakota Central Telephone Co., and such defendant is now estopped from pleading that the condition in said Ordinance No. 135 were ultra vires the City of Mitchell, South Dakota.

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## IX.

That the defendant is not entitled to recover on its counter-claim on account of the gross earnings charges paid by it for the year 1905 and 1906.

## X.

That the plaintiffs are entitled to recover their costs and disbursements in this action.

Let judgment be entered accordingly.

Dated at Mitchell, South Dakota, the 25th day of October, 1910.

By the Court:

FRANK B. SMITH,  
*Judge of Circuit Court.*

Attest:

[SEAL.] S. CATTRELL,  
*Clerk of Circuit Court.*

*Judgment.*

"This action having been tried at the November Term, 1908, of this Court, before the Court without a jury, and the Court having made Findings of Fact and Conclusions of Law therein, which are of record, and the Court having, on the 13th day of December, 1909, rendered judgment thereon for the defendant and against the de-

fendant, for the dismissal of the defendant's counterclaim;

72 and the plaintiffs having duly appealed to the Supreme Court of the State of South Dakota from that part of said judgment dismissing the plaintiffs' complaint and awarding costs to the defendant, and the said Supreme Court having on the 24th day of May, 1910, wholly reversed that part of said judgment appealed from, and the record in this cause having been duly remitted from said Supreme Court to this Court with directions that this Court enter judgment in favor of the plaintiffs for the amount found due and unpaid to said plaintiffs by the Ninth and Tenth Findings of fact of this Court, and for costs, both in this Court and in the Supreme Court; and due notice of such remittance having been given to the defendant as appears by the proof now on file; and due notice of application for this judgment having been given, and proof of such notice having been filed:

Now, therefore, in compliance with said mandate of the Supreme



urt and on motion of Lauritz Miller, attorney for the plaintiffs, It is ordered and adjudged that the plaintiffs, the City of Mitchell, D. Hitchcock as Mayor, Clarion D. Hardy, John McDougal, P. H. elley, A. A. Truax, Joseph Koch, A. H. Doyle and C. E. Reeves members of the City Council of the City of Mitchell, South Dakota, ve and recover of the defendant, Dakota Central Telephone Co., e sum of Two Thousand Sixty Six Dollars and Thirty Two Cents (\$2,066.32), principal and interest, together with the sum of One Hundred Twenty Six Dollars (\$126.00) costs on appeal, and the sum of \$21.50 Dollars costs in this Court, which costs all be taxed by the Clerk of this Court and by him inserted herein, d that the defendant's counter claim be and the same is hereby smitted.

Dated at Mitchell, South Dakota, the 25th day of October, 1910.

By the Court:

FRANK B. SMITH, *Judge.*

Attest:

[SEAL.] S. CATTRELL,

*Clerk of Circuit Court.*

That said amended conclusions of law and judgment stands un-  
versed and is now the law relative to said matters:

That the Supreme Court of South Dakota in said Judgment and  
eisions, determined and adjudicated as follows, to-wit:

1. That the said Section 3, Article X of the Constitution of South  
akota, as heretofore set out, granted to the defendant city the right  
grant or to refuse to grant to telephone companies the privilege  
franchise for establishing telephone systems within said city, upon  
uch terms and conditions as said city may choose to impose, and  
at such companies cannot accept the grant and refuse to comply  
ith the conditions upon which such grant was made.

2. That Subdivisions 7, 9, 10 and 17, of Section 1229, of the Re-  
sed Political Code of 1903, of South Dakota, as hereinbefore set  
out, gave to the defendant city the exclusive control over its  
streets and alleys.

3. That Section 554 of the Civil Code of 1903, of South  
akota, as set out in paragraph 1 of complainant's bill of complaint  
erein, is modified by the said Section 3, Article X, of the South  
akota Constitution, and the Subdivisions 7, 9, 10 and 17 of Section  
229 Political Code of 1903, and as so modified said statute did not  
ive to complainant the right of way over the streets, alleys and other  
ublic grounds in said city of Mitchell, exclusive of the consent of  
aid city.

4. That Ordinance No. 135 as set out in paragraph 3 of complain-  
nt's bill of complaint herein, is a valid and existing ordinance, and  
e same is a valid contract between the complainant and defendant  
erein, and the said complainant is operating its said local telephone  
exchange under said ordinance and is bound by the terms and condi-  
ions of said ordinance.

5. That Ordinance No. 180, as set out in paragraph 5, of Com-  
ainant's Bill of Complaint herein, did not repeal, qualify, or modify

said Ordinance No. 135, and did not give to the complainant the right to construct, maintain and operate a local telephone exchange in said city of Mitchell, but that the same only gave said complainant the right to construct, maintain and operate a long distance telephone system.

6. That said Resolution passed and adopted by the City Council of the City of Mitchell on the 10th day of April, 1907, as set out in paragraph 9 of Complainant's Bill of Complaint herein, did  
75 not repeal, amend or modify said ordinance No. 135 and did not give the plaintiff any additional rights to construct, maintain and operate a local telephone exchange in said city, other than granted in said ordinance No. 135, but that said resolution simply gave plaintiff permission to place its wires underground instead of stretching said wires on poles.

That said Judgment and decision is a full adjudication of the said matter and is binding upon the plaintiff and defendant herein, and upon this court, and the plaintiff is and ought to be estopped from litigating any of the matters so adjudicated in this suit.

### XXVII.

That as heretofore alleged, defendant is without knowledge as to whether plaintiff operates its long distance telephone lines beyond the borders of the State of South Dakota, but it avers that plaintiff's principal business is that of operating local and long distance exchanges within said State, and that any business or connections it may have outside is wholly incidental to its said business within the State of South Dakota; that its local exchange in the defendant city has been and can be operated wholly independent of any of its long distance connections either intra or inter state, and the defendant does not by the ordinances complained of, or otherwise, intend to interfere with any of the long distance operations of plaintiff or with its interstate business or with any agreement it may have with the United States or any person or corporation.

76 That the plaintiff has, since operating said local exchange in the defendant city, as well as its long distance lines, applied to the Board of Railroad Commissioners of South Dakota to fix and regulate its rates within said State, and that on the 17th of March, 1913, it applied to said Board of Railroad Commissioners to fix and establish rates in said city as follows:

"ABERDEEN, S. D., M'ch 17, 1913.

To the Honorable Board of Railroad Commissioners, of the State of South Dakota, Pierre, S. D.

GENTLEMEN: In accordance with Sec. 10, of Chap. 207 of the 1911 Session Laws, we, hereby, file the following rates; the same to become effective May 12th, 1913, and applying at Mitchell, S. D.:

Long Distance Automatic Telephone Rentals.

Main Line Business rate.....	\$3.25	pr.	Mo.
Main Line Residence rate.....	2.25	"	"
Four Party Residence rate.....	1.75	"	"
Calling & Talking Extensions.....	1.00	"	"
Talking Extensions.....	.50	"	"

## Private Branch Exchange:

For each Main Line Trunk.....	3.00 pr. Mo.
For each Station connected to the Private Branch Exchange .....	.50 pr. Mo.

77 A discount of 25¢ per month to be made on all rentals paid at our office in the city of Mitchell, on or before the 10th of the month for the current month's rental, except extension telephones and private branch exchanges, which will be net.

Yours truly,

DAKOTA CENTRAL TELEPHONE CO.,  
By W. G. BICKELHAUPT, *Sec'y.*"

By reason of all of the things hereinbefore alleged, and especially because plaintiff has operated its said local exchange in the defendant city under the terms and provisions of said ordinance No. 135, and has complied with the conditions thereof, and because it has acquired no other right to maintain or operate its said local exchange within said city, and because of the adjudication of the matters involved in the litigation between it and the defendant in the Circuit and Supreme Courts of South Dakota, as before alleged, and because it has applied to said Board of Railroad Commissioners to fix and allow its rates within said city, plaintiff is now and ought to be estopped from litigating the matters in controversy between plaintiff and the defendant in this suit, and from asserting any right to operate or maintain the local telephone exchange within said city beyond the express terms and conditions of said ordinance No. 135 from and after the 11th day of May, 1913, and from in any manner preventing the defendant from insisting upon and causing the immediate exclusion of its said local telephone exchange from said city on and after said date, and from requiring

78 it to vacate its streets, alleys, highways and other public grounds now occupied by it, and from in any manner hindering or delaying the defendant in the proper discharge of any of its duties and functions as a municipal corporation.

Wherefore, the defendant prays that plaintiff's bill of complaint be dismissed; that the restraining order heretofore granted by this Court in this suit be vacated; that the plaintiff be decreed to have no right whatsoever to operate or maintain its local telephone exchange within the defendant city from and after May 11th, 1913; that it be granted such further relief in the premises as the Court shall deem equitable, and that it recover its reasonable costs and disbursements herein.

LAURITZ MILLER,  
EDWARD E. WAGNER,  
*Solicitors for Defendant.*

(Exhibits A, B, C and D are omitted here pursuant to præcipe.)  
(Endorsed:) Eq. 5 S. D.—United States District Court, District of South Dakota, Southern Division—Dakota Central Telephone

Company, a corporation, vs. City of Mitchell, a municipal corporation—Answer—Filed May 10th, 1913, Oliver S. Pendar, Clerk, by Louis B. Trott, Deputy.

79 And, afterwards, to-wit: on the 10th day of September, A. D. 1915, there was entered and appears of record in Equity Journal, Vol. 2, Southern Division of said Court, and filed in the office of the clerk of said court on the 14th day of September, A. D. 1915, Decree; which said Decree is in words and figures the following, to-wit:

United States District Court, District of South Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation, Complainant,  
vs.

THE CITY OF MITCHELL, a Corporation, Defendant.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed, that the complainant, Dakota Central Telephone Company is now and since June 7th 1904, has been rightfully and lawfully maintaining and operating under the rights and privileges granted to the Dakota Central Telephone Lines (inc) by Ordinance No. 180 of the City of Mitchell, South Dakota, two separate and distinct telephone systems, one for local and one for long distance or toll line purpose, in the City of Mitchell, South Dakota.

It is further ordered, adjudged and decreed, That, that certain resolution passed, adopted and approved by the city council and Mayor of the City of Mitchell, South Dakota, on the 17th day of March, 1913, and which resolution was in words and figures  
80 as follows:

#### Telephone Resolution.

Whereas, the Dakota Central Company is maintaining, conducting and operating a local telephone system or exchange in the City of Mitchell, County of Davison, South Dakota, under the rights and privileges granted in, and in accordance with the terms and conditions of Ordinance No. 135 of the City of Mitchell, South Dakota, being an ordinance entitled, "An Ordinance Granting to F. B. Elce, his Associates, Heirs and Assigns the Use of the Streets, Alleys and Public Grounds of the City of Mitchell, S. D., for the erection and Maintenance of a Public Telephone System," and adopted the 11th day of May, 1898; and

Whereas, The rights and privileges granted by said Ordinance No. 135, by virtue of the limitation therein contained, will cease and terminate on the 11th day of May, 1913, and,

Whereas, The Dakota Central Telephone Company has failed and

refused to accept the terms and conditions of Ordinance No. 135, of the City of Mitchell, S. D., granting to the said Dakota Central Telephone Company the privilege to construct, maintain and operate a local telephone system or exchange in the City of Mitchell, S. D., for a period of 20 years from and after the said 11th day of May, 1913; and

Whereas, The said Dakota Central Telephone Company has no other rights than those granted by said Ordinance No. 135, to construct, operate and maintain a local telephone system or exchange in the City of Mitchell, South Dakota, and

81 Now, Therefore, be it hereby resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled, duly and regularly called, this 17th day of March, 1913, that the right and privilege of the Dakota Central Telephone Company, to construct, operate and maintain a local telephone system or exchange in the City of Mitchell, South Dakota, be, and the same are hereby terminated from and after the 11th day of May, 1913; and

Be it further resolved that said Dakota Central Telephone Company shall have no right or privilege to construct, operate or maintain a local telephone system or exchange in the City of Mitchell, South Dakota, from and after the 11th day of May, 1913; and

Be it further resolved that said Dakota Central Telephone Company be, and it is hereby notified and requested forthwith on the 11th day of May, 1913, to remove from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota; and

Be it further resolved that said Dakota Central Telephone Company be, and it is hereby notified and required that in case said company fails, neglects or refuses to comply with the provisions of said resolution, and to remove from the streets, alleys, avenues and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and  
82 operation of its local telephone exchange or system in the city of Mitchell, South Dakota, as herein required, then the City Council of the City of Mitchell, South Dakota, will take such steps as may be necessary to secure the immediate removal of said poles, wires, cables, fixtures and apparatus from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota; and,

Be it further resolved that a copy of this resolution be served upon said Dakota Central Telephone Company, by sending a copy of same by registered mail to J. L. W. Zeitlow, the President of said Company at Aberdeen, South Dakota, and that the City Auditor of the City of Mitchell, South Dakota, is hereby directed to forthwith mail a copy of this resolution by registered mail to said J. L. W. Zeitlow in accordance therewith; and

Be it further resolved that the mailing of a copy of this resolution to the City Auditor to the President of said Company as herein requires, and the receipt of such copy by said president shall constitute notice to said Dakota Central Telephone Company of the contents of this resolution and of the intention of the City Council of the City of Mitchell, South Dakota, relative to the matter herein contained.

Adopted and approved this 17th day of March, 1913.

A. E. HITCHCOCK, *Mayor.*

Attest:

N. H. JENSEN,  
*City Auditor."*

83 was and is unconstitutional and void, in that it impairs the obligation of the contract contained in Ordinance No. 180 of the City of Mitchell, South Dakota, in violation of Section 10, Article 1 of the United States Constitution, and deprives the complainant of its property without due process of law, in violation of Section 1, Article 14 of the United States Constitution.

It is further ordered, adjudged and decreed, that the defendant City of Mitchell, its officers, agents, attorneys and servants be and are hereby until June 7th, 1924, enjoined and restrained from in any manner, whether by force or by suit or legal proceedings of any kind or character, enforcing or attempting to enforce said resolution passed, adopted and approved by the City Council and Mayor of the City of Mitchell, South Dakota, on the 17th day of March, 1913.

It is further ordered, adjudged and decreed, that the defendant City of Mitchell, its officers, agents, attorneys and servants, be and are hereby until June 7th, 1924, enjoined and restrained from in any manner, otherwise than by the exercise of lawful police power, interfering with the poles, telephone lines, conduits and telephone exchange, now owned, maintained and operated by the complainant in said City of Mitchell, South Dakota, and particularly from cutting down, removing, destroying, or in any manner impairing or damaging, the said telephone poles, lines, conduits and exchange, so owned and operated by complainant in said City of Mitchell, South

84 Dakota, except that this shall not be construed to authorize this complainant to maintain poles and pole lines on Main Street, Park Avenue, Fourth and Fifth Streets.

It is further ordered, adjudged and decreed, that the complainant Dakota Central Telephone Company have and receive of the defendant City of Mitchell, South Dakota, its costs and disbursements in this suit, taxed and allowed herein at ——— Dollars.

Jurisdiction of this suit is hereby reserved for such further decree, to be entered at the foot of this decree, as may be necessary to fully protect and preserve the rights of the parties hereto.

By the Court:

[SEAL OF COURT.]

WILBUR F. BOOTH, *Judge.*

Attest:

OLIVER S. PENDAR, *Clerk.*



The defendant hereby excepts to the rendition and entry of the above and foregoing decree, which exception is hereby allowed.

Dated September 10, 1915.

[SEAL OF COURT.]

WILBUR F. BOOTH, *Judge.*

Attest:

OLIVER S. PENDAR, *Clerk.*

(Endorsed:) # 5, S. D. Equity. Dakofa Central Telephone Co. vs. City of Mitchell. Decree. Filed September 14, 1915. Oliver S. Pendar, Clerk.

85 And, afterwards, to-wit: on the 14th day of July, A. D., 1915, there was filed in the office of the clerk of this court, Opinion of the Court; which said Opinion is in words and figures the following, to-wit:

United States District Court, District of South Dakota, Southern Division.

In Equity.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation, Complainant,

vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

The above entitled cause coming regularly on for final hearing, Thomas H. Null, Esq., and Dick Haney, Esq., appeared in behalf of complainant. Lauritz Miller, Esq., and E. E. Wagner, Esq., appeared in behalf of defendant.

The suit is in equity brought for the purpose of enjoining the defendant from enforcing the provisions of a certain resolution or ordinance passed by defendant on the 17th day of March, 1913; and further, enjoining the defendant, its officers and agents from interfering with the poles, telephone lines and appurtenances of the complainant, situated in said City of Mitchell.

Diversity of citizenship does not exist between the parties, and jurisdiction is asserted solely because the controversy is claimed to be one arising under the Constitution of the United States. The action on the part of the defendant which is complained of and sought to be restrained, is claimed by complainant to be in violation of Article One, Section ten, of the Constitution of the United States; and also of the due process clause of the 14th amendment to said constitution.

86 The facts in the case are largely undisputed. From the stipulation of facts entered into by the respective parties, from the admissions in the pleadings, and from the evidence offered upon the hearing, the following facts appear:

The complainant is, and since the 30th day of August, 1904, has been a corporation organized under the laws of the State of South



Dakota, and is empowered and authorized to purchase, construct and operate telephone lines and exchanges in said State. The defendant is a municipal corporation, situated in the County of Davison and State of South Dakota.

On or about May 11, 1898, the city council of the City of Mitchell duly passed and adopted, and the mayor of said city approved, the following ordinance known as Ordinance No. 135.

\* Ordinance No. 135.

"An Ordinance Granting to F. B. Elce, his Associates, Heirs and Assigns the use of the Streets, Alleys and Public Grounds of the City of Mitchell, S. D., for the Erection and Maintenance of a Public Telephone System.

Be it ordained by the City Council of the City of Mitchell, South Dakota:

Section 1. That in consideration of the benefits to be derived by the inhabitants of the City of Mitchell by the establishment of a public telephone system in said City, the said F. B. Elce, his associates, heirs and assigns are hereby granted the right to the  
87 use of the streets, alleys and public grounds of the said city of Mitchell, S. D., for the creation and maintenance of a public telephone system for the term of fifteen years from the date of the adoption or approval of this ordinance.

Section 2. That for such purpose the said F. B. Elce, his associates, heirs and assigns may enter upon any of the streets, alleys and public grounds of the said city of Mitchell and erect poles and stretch wires, and erect such other appliances as may be necessary and proper for the establishment of such telephone system. Provided, that such poles, wires and appliances shall not be placed so as to in any way interfere with the rights of owners of adjacent property, nor with the free passage of vehicles; and that lines of poles, wires, and other appliances, shall be located as far as possible in the alleys of said City. Provided further, that in no case shall the poles, wires and other appliances be placed on Main Street, except for the purpose of crossing said Main Street, upon the streets running east and west. It is also provided that the said City Council shall have the right to direct the location of all poles and lines of wires upon the said streets, and the erection of all poles and lines or wires shall be under the direction and subject to the approval of the City Council of the said City of Mitchell.

88 Section 3. That the privileges herein granted are given under the following conditions, to-wit: That the said F. B. Elce, his associates, heirs and assigns, shall, within six months after the passage and approval of this ordinance, have at least twenty telephones in successful operation; that the said F. B. Elce, his associates, heirs and assigns, shall provide a suitable and convenient place for a central office, and shall maintain such office in operation during the business hours of each day during the year and at such other times as the business may demand, and the maximum rent for

the said paying telephones established under this ordinance shall not exceed two dollars per month for business houses and one dollar and twenty five cents per month for residence houses for service within the city limits of the city of Mitchell; Provided, that if the said F. B. Elce, his associates, heirs and assigns shall fail or neglect to have at least twenty telephones in successful operation at the expiration of six months from the adoption and approval of this ordinance then this ordinance shall be null and void, and all rights and privileges granted thereunder revoked.

89 Section 4. That in consideration of the said City of Mitchell granting to the said F. B. Elce, his associates, heirs and assigns, the right and privilege to use the streets, alleys and public grounds of the said City of Mitchell, for the erection and maintenance of a public telephone system, the said F. B. Elce, his associates, heirs and assigns shall erect and maintain three telephones at such places as the City Council shall direct, and that the said three telephones shall be furnished to the said City during the term of fifteen years without cost or expense to the City of Mitchell; Provided, also, that at any time after three years from the adoption and approval of this ordinance that the gross receipts of the said telephone system for any one year shall be in excess of the sum of Two Thousand Four Hundred Dollars (\$2,400), the said F. B. Elce, his associates, heirs and assigns, shall pay to the City of Mitchell ten per cent of the amount in excess of Two Thousand Four Hundred Dollars (\$2,400) received as gross receipts from the said telephone system, which said sum shall be paid to the City at the end of each and every year, and the City Council shall have the right and privilege to examine the books of the said telephone system for the purpose of ascertaining the gross earnings of the said telephone system.

90 Section 5. That no exclusive right or privilege is hereby granted to the said F. B. Elce, his associates, heirs and assigns.

Section 6. That if the said F. B. Elce, his associates, heirs and assigns shall fail to comply with any of the provisions of this ordinance then the City Council of the City of Mitchell shall have the power to declare the privileges granted in this ordinance forfeited and revoked; Provided, that due notice of such intention shall be given by the said City Council to said F. B. Elce, his associates, heirs, and assigns, and a reasonable time thereafter shall be given him or them in which to comply with said provisions.

Section 7. This ordinance shall take effect and be in force from and after its passage, approval and publication.

Adopted and approved May 11th, 1898.

THOMAS FULLERTON, Mayor.

Attest:

J. K. SMITH,

City Auditor.

Pursuant to said ordinance said F. B. Elce installed a local telephone system in the City of Mitchell, and occupied the streets,

alleys and public grounds of said city in connection therewith; and owned and operated said telephone exchange until about May 91 25, 1904, on which last mentioned date a contract of sale covering said telephone exchange and appurtenant property was entered into between said F. B. Elce and the Dakota Central Telephone Lines, and said sale was finally consummated July 6, 1904.

The Dakota Central Telephone Lines on and prior to May 25, 1904, was a corporation duly organized under the laws of the State of South Dakota, and was authorized to acquire and operate in the State of South Dakota telephone lines, both those known as long distance lines, and those known as local exchange lines.

On or about March 21, 1904, the city council of the City of Mitchell adopted and passed, and the mayor approved an ordinance in words and figures as follows:

#### Ordinance No. 174.

An ordinance to grant permission to the Dakota Central Telephone Lines (Inc.), their successors or assigns the right to erect poles and fixtures, and to string wires for the purpose of operating long distance telephone lines, within and through the city of Mitchell, South Dakota.

Be it ordained by the council of the City of Mitchell, South, Dakota,

Section 1. That there is hereby granted the right and privilege given to the Dakota Central Telephone Lines, (Inc.) their successors and assigns, to erect poles, and string wires on any of the streets, alleys and public highways of the City of Mitchell, excepting Main Street, Park Avenue, Fourth Street and Fifth Street, and maintain the same for a period of twenty years, from and after the passage and approval of this ordinance, for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing near or at a distance from Mitchell, and all such rights to be continued on the conditions herein named.

Section 2. The poles and wires are to be located under the direction of the street commissioner, or a committee appointed by the city council.

Section 3. All poles, wires and fixtures are to be placed so as not to interfere with the ordinary travel and traffic on the streets, alleys and public highways, or shade or ornamental trees in said city of Mitchell; and are not to interfere with the flow of water in any main, sewer, or gutter in said city of Mitchell; and the city of Mitchell may adopt any reasonable rules and regulations of a police nature, as may be deemed necessary, not destructive, however, to the rights and privileges herein granted.

Section 4. The rights and privileges herein granted are not exclusive, and the said city of Mitchell reserves the right to grant the

rights and privileges to other parties, the same, however, not to interfere with the rights and privileges herein granted.

Section 5. In consideration of the above, the city of Mitchell, S. D. have the right to string wires on the poles of the Dakota Central Telephone Lines for fire alarm purposes, said work to be superintended by the above company and such wires are not to interfere with the workings of the wires of the Dakota Central Telephone Lines.

Section 6. This ordinance shall be in effect from and after the date of passage and approval.

Passed March 21st, 1904.

Approved:

J. L. HANNETT,  
*Act'g Mayor.*  
J. G. MARKHAM, *Auditor.*

On or about the 7th day of June, 1904, the city council of the City of Mitchell adopted and passed, and the mayor of said city duly applied an ordinance in words and figures as follows:

Ordinance No. 180.

An ordinance to grant permission to the Dakota Central Telephone Company (Inc.), their successors or assigns, the right to erect poles and string wires and to string wires for the purpose of operating a long distance telephone system within and through the city of Mitchell, South Dakota.

It is ordained by the city council of the city of Mitchell, South Dakota.

Section 1. That there is hereby granted the right and privilege, to the Dakota Central Lines, (Inc.), their successors or assigns, to erect poles, and string wires on any of the streets, alleys and public highways of the city of Mitchell, excepting Main, Park Avenue, Fourth and Fifth Streets, this exception, however, not to prohibit the crossing of Main, Park Avenue and Fourth and Fifth Streets, at right angles, where it is necessary, and maintain same for a period of twenty years, from and after the passage and approval of this ordinance, for supplying the citizens of the city of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices, with parties residing in, or at a distance from Mitchell, and all such rights to be conditioned on the conditions herein named.

Section 2. The poles and wires are to be located under the direction of a committee, appointed by the city council.

Section 3. All poles, wires and fixtures are to be placed so as not to interfere with the ordinary travel and traffic on the streets, alleys and public highways or shade or ornamental trees in said city of Mitchell; and are not to interfere with the flow of water in any main, sewer, or gutter in said city of Mitchell; and the City of Mitchell may make any reasonable rules and regulations of a police nature, as may

be deemed necessary, not destructive, however, to the rights and privileges herein granted.

Section 4. The rights and privileges herein granted are not exclusive, and the said City of Mitchell reserves the right to grant the same rights and privileges to other parties, the same, however, not to interfere with the rights and privileges herein granted.

95 Section 5. In consideration of the above, the City of Mitchell shall have the right to string wires on the poles of the Dakota Central Telephone Lines for fire alarm purposes, said work to be superintended by the above company and such wires are not to interfere with the workings of the wires of the Dakota Central Telephone Lines.

Section 6. This ordinance shall be in effect from and after the date of its passage and approval.

Passed June 6th, 1904.

Approved June 7th, 1904.

GEO. A. SILSBY, *Mayor.*  
J. G. MARKHAM, *Auditor."*

Some years prior to 1904 the Dakota Southern Telephone Company, a co-partnership, had constructed long distance telephone lines running into the City of Mitchell; but it does not appear that any formal consent thereto has ever been given by the city of Mitchell. In 1903, the Dakota Central Telephone Lines purchased these long distance lines from the Dakota Southern Telephone Company.

From the time of the purchase by the Dakota Central Telephone Lines of the local exchange from Elce, up to the 2nd of October, 1904, said Dakota Central Telephone Lines operated said local telephone exchange; and from the time of the purchase of the long distance lines from the Dakota Southern Telephone Company until the 2nd day of October, 1904, the Dakota Central Telephone

96 Lines operated the long distance lines thus purchased.

On October 2, 1904, complainant the Dakota Central Telephone Company purchased from the Dakota Central Telephone Lines both the local telephone exchange and the long distance lines, and since the last mentioned date the complainant has owned and operated the same, together with additions thereto constructed by the defendant. No formal consent, however, has ever been obtained from the City of Mitchell by the complainant to construct or operate a long distance telephone system within the corporate limits of said City of Mitchell, except as such consent may be contained in ordinances 174 and 180.

On or about April 10, 1907, the city council of said City of Mitchell duly approved a resolution in words as follows:

"Be it resolved by the city council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, their successors and assigns, to place, construct and maintain, through and under the streets, alleys and public grounds of said city such conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public

general, communication by telephone and other improved appliances."

Prior to 1912 the complainant constructed in said city a fireproof telephone exchange building, which has been in use ever since; and during the latter part of the year 1912 and the first part of the year 1913, complainant installed in said City of Mitchell an automatic telephone system for local use. The installation of this automatic telephone system, however, was without request or consent on the part of said city. On March 17th, 1913, the City of Mitchell by its said council in regular session, passed, adopted and published, and the mayor duly approved, the following resolutions:

### Telephone Resolution.

Whereas, the Dakota Central Telephone Company is maintaining, conducting and operating a local telephone system or exchange in the city of Mitchell, County of Davison, South Dakota, under the rights and privileges granted in, and in accordance with the terms and conditions of Ordinance No. 135 of the City of Mitchell, South Dakota, being an ordinance entitled, "An Ordinance Granting to F. B. Elce, His Associates, Heirs and Assigns the Use of the Streets, Alleys and Public Grounds of the City of Mitchell, S. Dak., for the Erection and Maintenance of a Public Telephone System." and adopted the 11th day of May, 1898; and,

Whereas, the rights and privileges granted by said Ordinance No. 135, by virtue of the limitation therein contained, will cease and terminate on the 11th day of May, 1913; and,

Whereas the Dakota Central Telephone Company has failed and refused to accept the terms and conditions of Ordinance No. 305 of the City of Mitchell, S. Dak., granting to the said Dakota Central Telephone Company the privilege to conduct, maintain and operate a local telephone system or exchange in the city of Mitchell, S. D., for a period of 20 years from and after the said 11th day of May, 1913; and

Whereas the said Dakota Central Telephone Company has no other rights than those granted by said Ordinance No. 135, to construct, maintain and operate a local telephone system or exchange in the city of Mitchell, South Dakota;

Now Therefore, be it hereby resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled duly and regularly called, this 17th day of March, 1913, that the right and privilege of the Dakota Central Telephone Company, to construct, operate and maintain a local telephone system or exchange in the City of Mitchell, South Dakota, be, and the same are hereby terminated from and after the 11th day of May, 1913; and

Be it further resolved that said Dakota Central Telephone Company shall have no right or privilege to construct, operate or maintain a local telephone system or exchange in the city of Mitchell, South Dakota, from and after the 11th day of May, 1913; and

Be it further resolved that said Dakota Central Telephone Com-



pany be, and it is hereby notified and requested forthwith on the 11th day of May, 1913, to remove from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota, and

Be it further resolved that the said Dakota Central Telephone Company be, and it is hereby notified and required that in case said company fails, neglects or refuses to comply with the provisions of this resolution and to remove from the streets, alleys, avenues and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota, as herein required, then the City Council of the City of Mitchell, South Dakota, will take such steps as may be necessary to secure the immediate removal of said poles, wires, cables, fixtures and apparatus from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota; and,

Be it further resolved that a copy of this resolution be served upon said Dakota Central Telephone Company, by sending a copy of the same by registered mail to J. L. W. Zeitlow, the President of said Company, at Aberdeen, South Dakota, and that the City Auditor of the City of Mitchell, South Dakota, is hereby directed to forthwith mail a copy of this resolution by registered mail to said

J. L. W. Zeitlow in accordance herewith; and

100 Be it further resolved that the mailing of a copy of this resolution by the City Auditor to the president of said company as herein required, and the receipt of such copy by said president shall constitute notice to said Dakota Central Telephone Company of the contents of this resolution and of the intention of the City Council of the City of Mitchell, South Dakota, relative to the matter herein contained.

Approved and adopted this 17th day of March, 1913.

A. E. HITCHCOCK, *Mayor*.

Attest:

N. H. JENSEN,

*City Auditor.*

#### Telephone Resolution.

Whereas the right of the Dakota Central Telephone Company to construct, maintain and operate a local telephone exchange or system, in the City of Mitchell, South Dakota, will cease and terminate on the 11th day of May, 1913; and

Whereas, the City Council of the City of Mitchell, South Dakota, and the said Dakota Central Telephone Company have failed to agree upon the terms and conditions upon which the said company might continue to operate and maintain a local telephone exchange



or system in the City of Mitchell, South Dakota, from and after the said 11th day of May, 1913, and,

101 Whereas the City Council of said city is desirous of protecting its rights in said matter;

Now therefore, to protect its said rights and to avoid waiving said rights,

Be it resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled, duly and regularly called this 17th day of March, 1913, that all the officers and employees of the said City of Mitchell, South Dakota, be, and they are hereby directed and requested not to contract, either directly or indirectly, with the Dakota Central Telephone Company, for any local telephone service from said company in the City of Mitchell, South Dakota, from and after the 11th day of May, 1913, until the controversy now existing between said city and the company has been adjusted, and they are further directed and requested to terminate, on the said 11th day of May, 1913, all relation existing on that date, between them and the Dakota Central Telephone Company relative to local telephone service furnished by said Dakota Central Telephone Company, in said City of Mitchell, South Dakota.

Adopted and approved the 17th day of March, 1913.

A. E. HITCHCOCK, *Mayor*.

Attest:

N. H. JENSEN,

*City Auditor.*

#### Fire Alarm Resolution.

Whereas the right of the Dakota Central Telephone Company to construct, maintain and operate a local telephone system or exchange in the City of Mitchell, South Dakota, ceases and

102 terminates on the 11th day of May, 1913; and

Whereas, the said Dakota Central Telephone Company has heretofore furnished the City of Mitchell, South Dakota, all necessary fire alarm service.

Now Therefore, be it resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled, duly and regularly called, that the City of Mitchell, South Dakota, purchase and install a fire alarm system for said City of Mitchell, South Dakota, to be used from and after the 11th day of May, 1913; and,

Be it further resolved that the city engineer of the city of Mitchell, South Dakota, be and he is hereby authorized and directed to prepare plans and specifications for a complete and adequate fire alarm system for the City of Mitchell, South Dakota, and to report said plans and specifications as soon as completed to the City Council of the City of Mitchell, South Dakota.

Adopted and approved this 17th day of March, 1913.

A. E. HITCHCOCK, *Mayor*.

Attest:

N. H. JENSEN,

*City Auditor."*

Under the system established by complainant since its purchase of the long distance lines and the local telephone exchange from the Dakota Central Telephone Lines, subscribers in the City of

Mitchell are charged a flat rate per month for telephone exchange facilities furnished for communicating with each other, but are charged special rates or tolls for each long distance message transmitted. Said subscribers are enabled to transmit long distance messages from, and to receive long distance messages at their own local telephones, connection being made between the local exchange wires and the long distance wires, by means of an operator at the telephone exchange. Not all of the subscribers use the long distance facilities furnished; some make use of the local exchange exclusively, but long distance facilities are open to all subscribers upon equal terms.

Other facts, either as stipulated, or as they appear from the evidence, will be referred to later.

The main question in the case, apart from the question of jurisdiction, is as to the proper construction of ordinances 174 and 180 and, inasmuch as the two ordinances are substantially identical with the exception of a few words contained in the later ordinance, the former ordinance No. 174 is of value mainly by way of reference or comparison.

The construction of ordinance 180 contended for by the complainant is, that said ordinance granted to complainant a franchise to operate and maintain not merely long distance telephone lines so called, through the City of Mitchell, but also a local telephone exchange within said city. The defendant contends that the ordinance in question gives to the company merely the right to construct and maintain a long distance telephone system, as distinguished from a local exchange.

Before taking up the question of the proper legal construction of said ordinance, it may be advisable to take up and dispose of certain preliminary questions raised by one or the other of the parties.

Involved in the case is not merely the proper legal construction of ordinance No. 180, but also the extent of the powers of the City of Mitchell in passing the several ordinances and resolutions hereinbefore referred to. As bearing upon this question, the following provisions of the constitution of the State of South Dakota, and of the statutes of said State are pertinent.

Section 3 of Article 10 of the State constitution provides that

"No telephone line shall be constructed within the limits of any village, town or city, without the consent of its local officers."

Sec. 554 of the Civil Code of the State provides:

"There is hereby granted to the owners of any telegraph or telephone lines operated in this state, the right of way over lands and real property belonging to the state, and the right to use public grounds, streets, alleys, and highways in this state, subject to control of the proper municipal authorities as to what grounds, streets, alleys, or highways said lines shall run over or across, and the place the poles to support the wires are located; the right of way over

real property granted in this act may be acquired in the same manner and by like proceedings as provided for railroad corporations."

Section 1229 of the Political Code of the State provides:

105

The City council shall have the following powers:

Subdivision 7. To lay out, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds and vacate the same."

Subdivision 9. To regulate the use of the same.

Subdivision 10. To prevent and remove obstruction and encroachments upon the same.

Subdivision 17. To regulate and prevent the use of streets, sidewalks and public grounds for signs, sign posts, awnings, telegraph or telephone poles, horse troughs, racks, posting hand-bills and advertisements."

One of the contentions of the complainant is, that as soon as the consent to enter the city was granted by ordinance 180 and the later resolution of 1907, then and thereafter, under the provision of Sec. 554 of the Civil Code above cited, complainant was subject to municipal control only as to what grounds, streets, alleys and highways it should occupy, and as to what places the poles should be located on. In other words, "Consent having been given, the right of the city to control telephone companies results from the statute, and not from the ordinance resolution, or action of the local authorities by which the consent is manifested, and consent once given cannot be revoked." This doctrine relied upon by the complainant, was announced by the Supreme Court of said State, in *Missouri River Tel. Co. v. City of Mitchell*, 116 N. W. 67, and as applied to the facts of that case may not be open to criticism.

106 It cannot, however, be doubted that under a later decision of the Supreme Court of South Dakota, a city may grant a telephone franchise to a company, with various conditions annexed. In the case of *City of Mitchell v. Dakota Central Telephone Co.*, 127 N. W., 582, the Court in its opinion, after referring to the various sections of the constitution and statutes above quoted, uses the following language:

"It is quite apparent from this section of the Constitution that there is reserved to the municipality the right to grant or refuse to grant to telephone companies the privilege or franchise for establishing a telephone system within the municipality, and that it necessarily follows that, if it had the right to refuse to grant such franchise or privilege, it necessarily has the right to grant the same upon such terms and conditions as it may choose to impose, and, if the telephone company accepts the conditions, they become binding upon the company. Such company cannot accept the grant and proceed to install their plant and refuse to comply with the conditions upon which the grant was made."

In the case of *City of Vermillion v. Northwestern Telephone Co.*, 189 Fed. 289, the Circuit Court of Appeals for the 8th circuit, speaking through Judge Amidon, referring to the above quoted provisions from the State constitution and statutes, in a case similar to the one at bar, said:

107 "Counsel for appellee contends that the consent of the city is confined by the Constitution to the "construction" of a telephone line, that the franchise to use the streets is derived from the state, and that it was not competent for the city to limit the privilege to a term of 10 years, as was attempted in the Cotters ordinance. We cannot accept this position. The Constitution vested the city with an absolute discretion as to the terms upon which it would give its consent. A limitation of the period for which the privilege should be enjoyed was not only within the provision of the Constitution, but was also justified by the highest wisdom and a proper protection of the rights of the city in its streets. Such limitations are at the present time a prominent feature of sound municipal action." And again—

"The right to use the streets, which the statute purports to give, being conditioned by the Constitution upon obtaining the consent of the municipal authorities, the source of the beneficial right would seem to be the city rather than the state."

To the same effect see *Andrews v. National Foundry*, 61 Federal 782; *Blair v. Chicago*, 201 U. S., 400; *Ghee v. Northwestern Union Gas Co.*, 158 N. Y. 510.

It results from the foregoing considerations that ordinance 13 was valid as to its conditions that it expired by limitation of time in May, 1913, and that whatever rights the complainant has 108 to maintain its poles, wires and telephone system in the streets of the city of Mitchell at the present time, must be derived from the ordinance 180 and the resolutions of 1907, construed in the light of the provisions of the constitution and the statutes hereinbefore quoted.

Another preliminary question is this: whether the legal construction of ordinance 180 is open for consideration and decision by the court at this time. It is claimed on the part of the defendant that the question of the legal construction of ordinance 180 is *res adjudicata*; and it bases its contention upon the decision in the case of *the City of Mitchell v. Dakota Central Telephone Company* above cited. Defendant claims that it was expressly decided in the case cited that ordinance No. 180 did not grant to complainant a franchise for a local telephone system.

It may well be doubted whether a construction of ordinance 180 as claimed by the defendant, even if announced by the State Court would prevent independent inquiry as to the proper construction of the ordinance by this court in a case of the character of the one at bar. While the question of the construction of a State statute or of an ordinance is, generally speaking, for the State Courts to decide in the first instance, and the construction adopted by the State court is, as a rule, binding upon the federal court; yet, whenever the question arises in the federal court whether State legislation has impaired the obligation of a contract, and the contract set up is contained in a State statute, or in an ordinance, then the federal 109 court will exercise an independent judgment in determining as to the existence of such contract, and the proper construction to be placed upon it.

In the case of *Mobile & Ohio R. Co. v. Tennessee*, 153 U. S., 486, the court in its opinion, speaking in reference to this question said:

"It is well settled that the decision of a state court holding that, as a matter of construction, a particular charter or a charter provision does not constitute a contract, is not binding on this court. The question of the existence or non-existence of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a state, by its terms or necessary operation, gives effect to some provisions of the state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligation."

In the case of *Mercantile Trust Co. v. City of Columbus*, 203 U. S., 311, the Court in its opinion used the following language:

"It is part of the duty of the Federal courts, under the impairment of the obligation of contract clause in the Constitution, to decide whether there be a valid contract and what its construction is, and whether, as construed, there is any subsequent legislation, by municipality or by the state legislature, which impairs its obligation."

And again, in the same opinion:

"It cannot be determined that there is an impairment of the obligation of a contract until it is determined what the contract is, and whether it is a valid contract. If it be valid, it still remains to be determined whether the subsequent proceedings of the city council and legislature impaired its obligations."

In the case of *Perry Co. v. Norfolk*, 220 U. S., 472, the Court said in its opinion, on page 479:

"This court, therefore, has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is."

The same rule is recognized in the late case of *Milwaukee Electric Light Co. v. R. R. Comm. of Wisconsin*, in an opinion handed down June 14, 1915, the court using the following language:

"It is true that this court has repeatedly held that the discharge of the duty imposed upon it by the Constitution to make effectual the provision that no State shall pass any law impairing the obligation of a contract, requires this court to determine for itself whether there is a contract, and the extent of its binding obligation, and parties are not concluded in these respects by the determination and decisions of the courts of the States. While this is so, it has  
111 been frequently held that where a statute of a State is alleged to create or authorize a contract inviolable by subsequent legislation of the State, in determining its meaning much consideration is given to the decisions of the highest court of the State."

Furthermore, careful analysis of the case relied upon (*City of Mitchell vs. Telephone Co. supra*) leads to the conclusion that there was not involved, either in the controversy, or in the decision of the court, the exact question involved in the case at bar. The real

question as to ordinance 180 involved in that case was, whether ordinance 180 had superseded ordinance 135, so that the earnings tax imposed under ordinance 135 could no longer be collected. Three reasons were given why ordinance 180 did not supersede ordinance 135. First, that there was no express repeal of ordinance 135 contained in ordinance 180; second, that repeal of ordinance by implication are not favored; third, that the two ordinances 135 and 180 did not cover so exactly the same field of scope, that it could be fairly said that the city intended by passage of ordinance 180 to repeal ordinance 135. Something further will be said later in respect to the scope of these two ordinances.

It may be well to state at this point that a considerable part of the testimony taken by the parties respectively as bearing upon the construction of said ordinance is, in my opinion, incompetent and must be eliminated from consideration. For example, testimony 112 by former members of the City Council as to what the intention or understanding of the city council was, or by officers of the telephone company as to their understanding of the language used in the ordinance.

In the case of *City of Vermillion v. Nat. Tel. Ex. Co.*, 189 Minn. 289, the Court said:

"Counsel for the city urges that extraneous evidence should be received to show that the resolution was intended to cover a three line only. But the meaning of municipal ordinances, like other legislative acts, must be ascertained from their language."

For a similar reason, certain ordinances which were offered in evidence by other cities, and testimony as to what was done under them, must also be excluded.

#### Ordinance No. 180.

The title of the ordinance is as follows:

"An ordinance to grant permission to the Dakota Central Telephone Lines (Incorporated) their successors and assigns, to use poles and fixtures, and to string wires for the purpose of operating a long distance telephone system, within and through the city of Mitchell, South Dakota."

The words "system," "within" and "through" contained in the title are significant; and taken together would seem to indicate that something more was intended to be granted than a mere right to carry long distance telephone wires through the city. In section one of the ordinance is granted the right and privilege 113 to erect poles and string wires on any of the streets, alleys and public highways of the City of Mitchell, excepting Main, Park Avenue and Fourth and Fifth Streets, this exception, however, not to prohibit the crossing of Main, Park Avenue and Fourth and Fifth Streets at right angles, where it is necessary." This language of the ordinance is broad and comprehensive, and certainly capable of a construction broad enough to cover the erection and maintenance of a local exchange.

Again, in the same section is the following language: "for



plying the citizens of the City of Mitchell, and the public in general, facilities to communicate with parties residing in, near or at a distance from Mitchell." The words "in," and "near" are as important as the words "at a distance from," and cannot be disregarded in construing the section in question. It would be unreasonable to suppose that a right was granted to the telephone company to erect and operate a telephone system by which a citizen of Mitchell living near the city limits could talk over the telephone line with a party living ten rods distant, but outside of the city limits, but that said citizen could not talk with another citizen within the city over the telephone line, though the last named party were distant many times as far as the person outside of the city limits. In order that the construction of the defendant may prevail, it would be necessary to practically eliminate the words "in" and "near" from said section. But it is one of the cardinal rules of construction of ordinances that all words contained therein shall if possible be given full force and effect.

114 The defendant, however, relies upon the expression "long distance telephone" contained in said section, as indicating a purpose on the part of the city not to grant permission to the telephone company to maintain and operate under said ordinance a system whereby the citizens of Mitchell could communicate by telephone with each other. Much testimony has been introduced, without objection, on the part of the respective parties to this suit, touching the meaning of the words "long distance telephone." The testimony of the various witnesses has developed the fact that the words in question had at the time of the passage of ordinance 180 several different and distinct meanings. According to the testimony of some of the witnesses, the words indicated telephone communication by improved or more powerful transmitters. According to others, telephone communication by solid back transmitters. According to the testimony of other witnesses, telephone communication by toll lines running between towns and cities at a considerable distance from each other. According to the testimony of still other witnesses, telephone communication by telephone having a common battery system as distinguished from a local battery system. In my opinion, a fair conclusion from all the evidence in the case as to the meaning of the words "long distance telephone," as used in ordinance 180, is this: a telephone suitable and efficient for long distance use, and capable of being connected with and used in connection with wires running to distant points; and the meaning of said section is, that the telephone company was granted a franchise to furnish facilities of such character as to transmitters, receivers, poles, wires, switching devices and other necessary appliances, that the patrons of the company in the City of Mitchell could at their own homes or places of business communicate with others, whether in the city, near the city, or at a distance from the city. This construction, in my opinion, gives force and effect to all of the words of the grant, and does violence to none of the language therein contained.

115 The ordinance further, in Section 5, contains the following lan-



guage: "In consideration of the above, the City of Mitchell shall have the right to string wires on the poles of the Dakota Central lines for fire alarm purposes." In reference to a very similar clause contained in an ordinance, the Circuit Court of Appeals in the case of *City of Vermillion v. National Exchange Telephone Co.* supra, uses the following language:

"The resolution further provides 'that the city of Vermillion shall have the free use, if desired, of their poles for fire alarm and police wires.' This language clearly indicates that a local exchange was to be established. The use of the poles of a through line would have been of no advantage for the purpose of fire and police wires."

116 If we go outside of the language of the ordinance, and consider the circumstances leading up to and surrounding its passage, we are led to the same conclusion. At the time of the passage of the ordinance in 1904 a considerable percentage of the telephones in use in the City of Mitchell were equipped with an old style or type of transmitter, not capable of efficient service in long distance telephone work. Long distance facilities had become of great and growing importance. The telephone company in question was operating both long distance lines and local exchange lines in other parts of the State. Ordinance 174 had been passed in March 1904, but had been disapproved by the Telephone Company, as unsatisfactory. A new ordinance, No. 180, was prepared and submitted for passage. Ordinance 180 was largely in the same terms as ordinance 174, but there were several noticeable changes. In the title of Ordinance 180 occur the words "for the purpose of operating long distance telephone lines within and through the City of Mitchell." In the title of Ordinance 180 the above wording is changed so that it reads "for the purpose of operating a long distance telephone system within and through the City of Mitchell." Further, the word "in" was inserted between the word "residing" and the word "near", where the same occur towards the end of section one; so that while ordinance 174 read "with parties residing near or at a distance from Mitchell," ordinance 180 reads "with parties residing in, near or

117 a distance from Mitchell." These changes in the wording of the title and of this most important section of the ordinance are significant. The changes were made openly and advisedly. It cannot be believed that the changes were made without being discussed and fully understood by both parties interested.

Counsel for the defendant suggests that it is improbable that the city council would pass an ordinance providing for a second local exchange when one was already in existence. To this it may be answered that section 5 of ordinance 135 provides, "That no exclusive right or privilege is hereby granted to the said F. B. Elze, his associates, heirs and assigns," thus recognizing the possibility at least of more than one local exchange. Further, the local exchange then existing in the city at the time of the passage of ordinance 180 was not of the proper efficiency to form a part of a successful long distance system. The purchase of the local telephone system by the Dakota Central Telephone Lines had not been completed, at the time

of the passage of ordinance 174 and 180. As events shaped themselves, however, the Dakota Central Telephone Lines, instead of erecting and maintaining new local telephone facilities, purchased and improved the existing ones.

Counsel for the city further suggests that it is improbable that the city would have passed an ordinance which might result in taking away from the city the tax created under ordinance 135. There again it can be but of slight value to speculate as to the

118 motives of the city in passing ordinance 180. It may be observed, however, that there is no showing in the evidence in this case of any considerable amount of taxes received by the city under ordinance 135 prior to the passage of ordinance 180; nor is there any evidence that there was any sound or substantial basis for concluding that the revenue accruing under ordinance 135 from a purely local telephone system dissociated from a long distance telephone system would ever be of any considerable amount.

Counsel for defendant contends that the telephone company by paying taxes under ordinance 135 subsequent to the passage of ordinance 180, has placed a practical construction upon ordinance 180, as not granting a franchise to operate a local telephone exchange. While this suggestion is not without weight, it is by no means conclusive. It is not necessary to speculate upon the reasons why the telephone company continued to operate and pay taxes under ordinance 135 after the passage of ordinance 180. There may have been many and sufficient reasons. It is apparent upon the face of the two ordinances that greater *street* rights are granted under ordinance 135 than under ordinance 180. This of itself may have been sufficient.

Finally, counsel for the city suggests that the negotiations entered into between the telephone company and the city in 1912 looking towards the passage of a new ordinance, tend strongly to show that

the telephone company did not at that time claim any right

119 under ordinance 180 to maintain a local telephone exchange. Such negotiations can have but little weight in determining the questions in controversy here. The proposed new ordinance was not introduced in evidence, and its terms are not disclosed. It might very well be that the telephone company was willing to negotiate for a new ordinance looking to the acquisition of still greater rights and privileges than those which it already had under ordinance 180, and to continue perhaps for a longer time.

The conclusion therefore is that ordinance 180 did, as an integral part of the long distance telephone system franchise therein created, grant also the privilege or franchise to maintain and operate a local telephone exchange, the subscribers of the telephone company using the same local transmitters in sending their long distance messages as in sending their local messages.

The resolution passed by the city in March, 1913, must next be considered. It is claimed on the part of the defendant that these resolutions were not, strictly speaking, ordinances of the city, and therefore, not equivalent to a State law, within the meaning of those words as used in Section 10, Article I, of the United States Constitu-

tion. It is to be observed, however, that the resolution of March 17th, 1913, while designated as resolution, has all the attributes of an ordinance. It is alleged in the complaint and admitted in the answer that "the City of Mitchell did on the 17th day of March, 1913, by its city council in regular session assembled, pass, adopt 120 and publish said resolution", and further, "that the mayor of the city approved the same." The mere fact that this action by the city council was designated as a resolution instead of an ordinance, is not controlling. It is sufficient that the action was authorized duly taken, and of a character legislative as distinguished from merely administrative, or as a mere declaration of intention. The language of the resolution is clear and unambiguous, and reads: "Resolved by the city council of the City of Mitchell in special session assembled, duly and regularly called, this 17th day of March, 1913, that the right and privilege of the Dakota Central Telephone Company, to construct, operate and maintain a local telephone system or exchange in the City of Mitchell, South Dakota, be, and the same are hereby terminated from and after the 11th day of May, 1913";

"Be it further resolved that said Dakota Central Telephone Company shall have no right or privilege to construct, operate or maintain a local telephone system or exchange in the City of Mitchell, South Dakota, from and after the 11th day of May, 1913"; and

"Be it further resolved that said Dakota Central Telephone Company be, and it is hereby notified and requested forthwith on the 11th day of May, 1913, to remove from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and 121 description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota."

It is admitted in the answer of the defendant city that the purpose of the city in passing said resolution was "to exclude said local exchange (that of complainant) from said city from and after said date;" and in paragraph 15 of the answer it is admitted that "unless the complainant shall comply with the provisions of said resolution the defendant will take such steps as shall be necessary to remove said poles and wires, fixtures and apparatus from the streets."

The defendant contends that the effect of these resolutions was primarily a declaration of intention on the part of the city, and at most, simply the repudiation of a contract between it and the complainant, and in support of that view it cites and relies upon the cases of *St. Paul Gas Light Co. v. St. Paul*, 181 U. S., 142; *Dawson v. Columbia Trust Co.*, 197 U. S., 178; and *Des Moines v. City Ry. Co.*, 214 U. S., 179. On the other hand, the complainant claims that the resolution in question comes within the decisions in the cases of *Vicksburg v. Vicksburg Water Works*, 202 U. S., 453; *S. C. 185 U. S., 65*; *N. P. Ry. Co. v. Duluth*, 208 U. S. 583; *Iron Mountain Ry. Co. v. City of Memphis*, 96 Fed. 113; *A. T. & S. F. Ry. Co. v. Shawnee*, 183 Fed. 85. In the last case cited the Court in its opinion, speaking of a resolution passed by the city council of the city of

Shawnee, which was less drastic in its terms than the resolution in the case at bar, said:

122 "We think that this resolution is quite different from that in the Des Moines case, and that it is substantially like that held in *Northern Pacific Railway Co. v. Duluth*, 208 U. S., 583, 28 Sup. Ct., 341, 52 L. Ed., 630, to impair the obligation of a prior contract. It is more than a mere declaration of the attitude of the city and a direction to its law officer to bring suit in court. It not only denies the company has any right or title to the street arising from a lawful vacation, but demands that it shall assume the burden of opening it up and restoring it to public travel. The resolution is militant, not merely declaratory."

This language is applicable to the resolution of March, 1913. In my judgment, this resolution of March, 1913, was, so far as this case is concerned, equivalent to an ordinance. It was duly passed by the city council and had the force and effect of a legislative act. It was passed by the municipality as such under its authority from the legislature, and was a State law within the meaning of that term as used in Section 10, Art. I, of the Constitution of the United States.

If Ordinance 180 granted to the telephone company the right to maintain and operate a local telephone exchange in connection with its long distance system, and if the resolution of March, 1913, has the effect of an ordinance and is a legislative act, as distinguished from a mere declaration of intention, then it is clear that the resolution in question impairs the obligation of a contract between the complainant and the defendant, and deprives the complainant of its property without due process of law.

123 It is not necessary to enlarge upon this conclusion, as I do not understand that counsel for defendant question it, if the construction above placed upon ordinance No. 180 and upon the resolution of March, 1913, be correct.

The result is that the complainant is entitled to a permanent injunction as prayed for in its bill of complaint, enjoining and restraining the City of Mitchell, its officers, agents and servants from in any manner other than by exercise of lawful police power, interfering with, impairing or damaging the poles, telephone lines, and telephone exchange of complainant, owned, maintained and operated by it, upon the streets, alleys and public highways in said city as specified in Ordinance 180.

Formal decree may be prepared and submitted by counsel for complainant.

WILBUR F. BOOTH.

(Endorsed:) In Equity No. 5, Southern Division—Dakota Central Telephone Co. vs. City of Mitchell—Opinion of the Court—Filed July 14, 1915, Oliver S. Pendar, Clerk.

And afterwards, to-wit, on the 1st day of May, A. D. 1916, there was filed in the office of the clerk of said Court, Order extending time for settling Statement of Evidence; which said Order is in words and figures the following, to-wit:

124 In the District Court of the United States, District of South Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation,  
Complainant,

vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

*Order.*

This action having come before the Court by agreement of the parties, and pursuant to notice given by the defendant, at the Court room of said Court in the City of Minneapolis, Minnesota, on the 15th day of April, A. D. 1916, upon the application of the defendant for the approval of the defendant's proposed statement of the evidence lodged with the Clerk of said Court on the 1st day of April, A. D. 1916, and the plaintiff having objected to the adoption and approval of said statement of the evidence upon the ground that the appeal in said case had not — taken when said statement was lodged with the Clerk and copy thereof served on plaintiff's counsel, and the plaintiff's counsel having at the same time and place requested additional time in which to propose amendments to the defendant's said statement of the evidence, and the Court having this date allowed an appeal in said case to the Supreme Court of the United States, and signed a citation requiring plaintiff to be and appear in the Supreme Court of the United States, within sixty days from and after said 15th day of April, 1916, pursuant to said appeal, to show cause, if any there be, why the decree rendered against defendant and appellant should not be corrected and why justice should not be done to the parties

125 in that behalf; both parties having by their respective counsel *agreeing* thereto in open court, and good cause appearing therefor, it is ordered that plaintiff have until the 6th day of May, 1916, within which to propose amendments to the defendant's said statement of the evidence in said case, and the hearing upon the notice of the defendant on said application to have its said statement of the evidence approved by the Court and certified as a true, complete and properly prepared statement of the evidence in said case, is hereby continued and adjourned until the 6th day of May, 1916, at ten o'clock A. M., at the chambers of the Judge of the United States District Court at the Federal Building in the City of Minneapolis, Minnesota.

Dated April 15, 1916.

By the Court:

WILBUR F. BOOTH, *Judge.*

Attest:

[Seal of Court.]

OLIVER S. PENDAR, *Clerk.*

(Endorsed:) 5 S. D. Equity—United States District Court, District of South Dakota, Southern Division—Dakota Central Telephone Company, a corporation, Plaintiff, vs. The City of Mitchell, Defendant—Order—Gamble, Wagner & Danforth, Attorneys for Defendant, Sioux Falls, South Dakota—Filed May 1st, 1916, Oliver S. Pendar, Clerk.

126 And afterwards, to-wit, on the 8th day of May, A. D. 1916, there was filed in the office of the clerk of said court, Statement of Evidence; which said Statement of Evidence, together with Affidavit of Service and Notice attached thereto, is in words and figures the following, to-wit:

127 In the District Court of the United States, District of South Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation,  
Complainant,  
vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

*Affidavit of Service.*

STATE OF SOUTH DAKOTA,  
*County of Davison:*

Lauritz Miller, being first duly sworn on oath, deposes and says that he is one of the attorneys and solicitors for the above named defendant, and that on the 4th day of April, 1916, he served true copies of the annexed notice and statement of evidence upon the attorneys and solicitors for the complainant by personally delivering to and leaving with Dick Haney, a member of the firm of Spangler & Haney, at the office of said Spangler & Haney, in the City of Mitchell, State of South Dakota, true copies of said annexed notice and statement of the evidence.

LAURITZ MILLER.

Subscribed and sworn to before me this 4th day of April, 1916.

[NOTARIAL SEAL.]

LEWIS SHUSTER,

*Notary Public.*

(Endorsed:) United States District Court, District of South Dakota, Southern Division—Dakota Central Telephone Company vs. The City of Mitchell—Affidavit of Service—Filed April 10, 1916, Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

- 128 In the District Court of the United States, District of South Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation,  
Complainant,

vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

*Notice.*

To the Complainant and Messrs. Thomas H. Null, Spangler & Haney, Attorneys and Solicitors for Complainant:

You will please take notice, that on the 1st day of April, A. D. 1916, the defendant will lodge in the office of the Clerk of said Court at Sioux Falls, South Dakota, a condensed statement of the evidence in said cause, a true copy of which is herewith served upon you.

You are further notified that on the 15th day of April, A. D. 1916, at ten o'clock A. M., or as soon thereafter as counsel can be heard, the defendant will ask the Court at the Chambers of the Hon. Wilbur F. Booth, the Judge who presided at the trial of said case, at the building in which the United States District Court is held, commonly known as the Federal Building and Postoffice in the City of Minneapolis, Minnesota, to approve said statement and to certify the same as a true, complete and properly prepared statement of evidence in said case, material to the questions to be presented to the Supreme Court of the United States on appeal thereto, upon the assignment of errors filed by the defendant herein in support of said appeal.

Dated this 31st day of March, A. D. 1916.

LAURITZ MILLER,

EDWARD E. WAGNER,

*Attorneys and Solicitors for Defendant.*

- 129 (Endorsed:) United States District Court, District of South Dakota, Southern Division—Dakota Central Telephone Company vs. The City of Mitchell—Notice—Filed April 4, 1916, Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

- 130 In the District Court of the United States, District of South Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation,  
Complainant,

vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

*Statement of Evidence.*

At the trial of the above entitled action the following proceedings were had.



It was stipulated that the following should be taken and considered as facts upon the trial of this action:

1.

That the complainant, the Dakota Central Telephone Company, now is and ever since the 30th day of August, 1904, has been a corporation organized under the laws of the State of South Dakota, and by its charter is empowered and authorized to purchase, lease, construct and operate telephone lines and exchanges in the State of South Dakota, and that since the organization of said corporation the said complainant has acquired certain lines of telephone and telephone exchanges, and has been engaged as a common carrier in rendering telephone service and transmitting telephone messages and communications for the general public in and between cities, towns, villages and districts in which said complainant has telephone lines and exchanges.

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II.

That the defendant, the City of Mitchell, is and at all times mentioned in the complaint has been a municipal corporation situated in the County of Davison, State of South Dakota.

III.

That heretofore and on or about the 11th day of May, 1898, the City Council of the City of Mitchell adopted and passed and the Mayor of said City approved an ordinance, in words and figures as follows, which ordinance was designated as Ordinance No. 135:

"An Ordinance Granting to F. B. Elce, his Associates, Heirs and Assigns the use of the Streets, Alleys, and Public Grounds of the City of Mitchell, S. D., for the Erection and Maintenance of a Public Telephone System.

Be it ordained by the City Council of the City of Mitchell, South Dakota:

Section 1. That in consideration of the benefits to be derived by the inhabitants of the City of Mitchell by the establishment of a public telephone system in said city, the said F. B. Elce, his associates, heirs and assigns are hereby granted the right to the use of the streets, alleys and public grounds of the said City of Mitchell, S. D., for the erection and maintenance of a public telephone system for the term of fifteen years from the date of the adoption or approval of this ordinance.

Section 2. That for such purposes the said F. B. Elce, his associates, heirs and assigns may enter upon any of the streets, alleys and public grounds of the said City of Mitchell and erect poles and stretch wires, and erect such other appliances as may be necessary and proper for the establishment of such telephone system.

132        Provided, That such poles, wires, and appliances shall not be so placed as to in any way interfere with the rights of owners of adjacent property, nor with the free passage of vehicles; and that lines or poles, wires, and other appliances, shall be located as far as possible in the alleys of said city. Provided further, that in no case shall the poles, wires and other appliances be placed on Main Street, except for the purpose of crossing said Main Street upon the streets running east and west. It is also provided that the said city council shall have the right to direct the location of all poles and lines or wires upon the said streets, and the erection of all poles and lines or wires shall be under the direction and subject to the approval of the City Council of the said City of Mitchell.

Section 3. That the privileges herein granted are given under the following conditions, to-wit: That the said F. B. Elce, his associates, heirs and assigns, shall, within six months after the passage and approval of this ordinance, have at least twenty telephones in successful operation; that the said F. B. Elce, his associates, heirs and assigns, shall provide a suitable and convenient place for a central office, and shall maintain such office in operation during the business hours of each week day during the year, and at such other times as the business may demand; and the maximum rent for the said paying telephones established under this ordinance shall not exceed two dollars per month for business houses and one dollar and twenty-five cents per month for residence houses, for service within

133        the city limits of the City of Mitchell; Provided, that if the said F. B. Elce, his associates, heirs and assigns shall fail or neglect to have at least twenty telephones in successful operation at the expiration of six months from the adoption and approval of this ordinance then this ordinance shall be null and void, and all rights and privileges granted thereunder revoked.

Section 4. That in consideration of the said City of Mitchell granting to the said F. B. Elce, his associates, heirs, and assigns, the right and privilege to use the streets, alleys and public grounds of the said City of Mitchell, for the erection and maintenance of a public telephone system, and said F. B. Elce, his associates, heirs and assigns shall erect and maintain three telephones at such places as the City Council shall direct, and that the said three telephones shall be furnished to the said City during the term of fifteen years without cost or expense to the City of Mitchell; Provided, also, that at any time after three years from the adoption and approval of this ordinance that the gross receipts of the said telephone system for any one year shall be in excess of the sum of Two Thousand Four Hundred Dollars (\$2,400), the said F. B. Elce, his associates, heirs and assigns, shall pay to the City of Mitchell, ten per cent of the amount in excess of Two Thousand Four Hundred Dollars (\$2,400.) received as gross receipts from the said telephone system, which said sum shall be paid to the City at the end of each and every year, and the City Council shall have the right and privilege to examine the books of the said telephone system for the purpose of ascertaining the gross earnings of the said telephone system.

134 Section 5. That no exclusive right or privilege is hereby granted to the said F. B. Elce, his associates, heirs and assigns.

Section 6. That if the said F. B. Elce, his associates, heirs and assigns shall fail to comply with any of the provisions of this ordinance then the City Council of the City of Mitchell, shall have the power to declare the privileges granted in this ordinance forfeited and revoked; Provided, that due notice of such intention shall be given by the said City Council to the said F. B. Elce, his associates, heirs and assigns, and a reasonable time thereafter shall be given him or them in which to comply with said provisions.

Section 7. This ordinance shall take effect and be in force from and after its passage, approval and publication.

Adopted and approved May 11, 1898.

THOMAS FULLERTON, *Mayor*.

Attest:

J. K. SMITH,  
*City Auditor."*

This said ordinance was duly published and the said F. B. Elce, the grantee in said ordinance, No. 135, duly accepted the terms and conditions of said ordinance, and that under and in pursuance thereof the said grantee therein, F. B. Elce, installed a local telephone system in the said City of Mitchell, South Dakota, and used and occupied the streets, alleys, public grounds and highways of said City with the poles, wires and fixtures used in the operation of said telephone system.

That the said F. B. Elce, within six months after the passage and approval and publication of said ordinance No. 135 did have not less than twenty telephones installed and in successful operation in said

City, as provided by said ordinance, and that said F. B. Elce  
135 conducted, owned and operated said local telephone in said City of Mitchell, until on or about the 25th day of May, 1904, at which time said Elce entered into the following contract for the sale of said local telephone exchange to the Dakota Central Telephone Lines, which contract — in words and figures as follows, to-wit:

"This agreement made this 25th day of May, 1904, by and between F. B. Elce, of Mitchell, S. D., party of the first part, and the Dakota Central Telephone Lines, a corporation, party of the second part; witnesseth:

The party of the first part hereby agrees to convey to party of the second part by sufficient bill of sale all the property now known as the Mitchell Telephone Exchange, switchboard- and appliances of every nature, now used in the exchange known as the Mitchell Telephone Exchange, and also to convey by warranty deed the building as well as the lots on which the buildings is located, containing the said Telephone Exchange; also the lots adjoining, a description of which is as follows:

Lots Five (5) and six (6) in Block Eleven (11) in M. H. Rowley's Addition to Mitchell.

In consideration whereof the party of the second part agrees to pay to the party of the first part the sum of \$18,000.00; the same to be paid in installments as follows:

\$100.00 on May 25th, 1904, the receipt whereof is hereby acknowledged.

\$4900.00 on June 6th, 1904;

\$6500.00 on June 15th, 1904;

\$6500.00 on July 1st, 1904.

136 The party of the first part covenants and agrees with the party of the second part that the aforesaid property is free from incumbrances of whatsoever nature.

It is further agreed by the parties hereto, that the party of the first part is to have possession of the property until June 1st, 1904, and is entitled to all the earnings and revenues therefrom up to that date, but all the earnings and revenues accruing after June 1st, 1904 are to inure to the party of the second part.

The party of the first part is to manage the business until the date of delivery, June 1st, 1904.

T. B. ELCE.

DAKOTA CENTRAL TELEPHONE LINES.

J. L. W. ZEITLOW, *Pres.*

E. ZEITLOW.

W. G. BICKELHAUPT.

That the consideration for the sale of said telephone exchange by Elce to said Dakota Telephone Lines was paid as follows:

May 25, 1904.....	\$100.00
June 3, 1904.....	4900.00
June 18, ".....	6500.00
July 6, ".....	6500.00

That on the 3rd day of June, 1904, a deed and bill of sale for the conveyance of said property were executed and deposited in the First National Bank of Mitchell in escrow for delivery to said Dakota Central Telephone Lines on payment of said sums; that

137 on the final payment thereof, July 6, 1904, said deed and bill of sale were delivered and said sale was consummated in accordance with the terms of said contract.

#### IV.

That at and prior to the 1st day of June, 1904, the Dakota Central Telephone Lines, named and mentioned in paragraph four of complainant's bill of complaint, was and has been a corporation duly organized and doing business under the laws of the State of South Dakota; and that on or about the 21st day of March 1904, the City Council of the said City of Mitchell, South Dakota, adopted and passed and the Mayor of said City approved an ordinance, in words and figures as follows:

## Ordinance No. 174.

An Ordinance to Grant Permission to the Dakota Central Telephone Lines, (Inc.) their Successors or Assigns, the Right to Erect Poles and Fixtures, and to String Wires, for the Purpose of Operating Long Distance Telephone Lines, Within and Through the City of Mitchell, South Dakota.

Be it ordained by the Council of the City of Mitchell, South Dakota.

Section 1. That there is hereby granted the right and privileges, given to the Dakota Central Telephone Lines, (Inc.) their successors and assigns, to erect poles, and string wires on any of the streets, alleys and public highways of the City of Mitchell, excepting Main Street, Park Avenue, Fourth Street and Fifth Street, and maintain the same for a period of twenty years, from and after the passage and approval of this ordinance, for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing near or at a distance from Mitchell, and all such rights to be continued on the conditions herein named.

Section 2. The poles and wires are to be located under the direction of the street commissioner, or a committee appointed by the City Council.

3. All poles, wires and fixtures are to be placed so as not to interfere with the ordinary travel and traffic on the streets, alleys and public highways, or shade or ornamental trees, in said city of Mitchell; and are not to interfere with the flow of water in any main, sewer, or gutter in said city of Mitchell; and the City of Mitchell may adopt any reasonable rules and regulations of a police nature, as may be deemed necessary, not destructive, however, to the rights and privileges herein granted.

Section 4. The rights and privileges herein granted are not exclusive, and the said City of Mitchell reserves the right to grant the same rights and privileges to other parties, the same, however, not to interfere with the rights and privileges herein granted.

Section 5. In consideration of the above, the city of Mitchell, S. D., shall have the right to string wires on the poles of the Dakota Central Telephone Lines for fire alarm purposes, said work to be superintended by the above company and such wires are not to interfere with the workings of the wires of the Dakota Central Telephone Lines.

139 Section 6. This ordinance shall be in effect, from and after the date of its passage and approval.

Passed March 21st, 1904.

Approved.

J. L. HANNETT, *Act. Mayor.*  
J. G. MARKHAM, *'Auditor.'*

That said ordinance was duly published according to law, and that thereafter and on or about the 7th day of June, 1904, the

City Council of the City of Mitchell adopted and passed and the Mayor of said City approved an ordinance, in words and figures as follows:

**Ordinance No. 180.**

An Ordinance to Grant Permission to the Dakota Central Telephone Lines, (Inc.), their Successors or Assigns, the Right to Erect Poles and Fixtures and to String Wires, for the Purpose of Operating a Long Distance Telephone System, Within and Through the City of Mitchell, South Dakota.

Be it ordained by the City Council of the City of Mitchell, South Dakota:

Section 1. That there is hereby granted the right and privilege given to the Dakota Central Telephone Lines, (Inc.) their successors or assigns to erect poles, and string wires on any of the streets, alleys and public highways of the city of Mitchell, excepting Main Park Avenue, Fourth and Fifth Streets, this exception, however, not to prohibit the crossing of Main, Park Avenue and Fourth and

140 Fifth Streets, at right angles, where it is necessary, and maintain the same for a period of twenty years from and after the passage and approval of this ordinance, for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing in, near or at a distance from Mitchell, and all such right to be continued on the conditions herein named.

Section 2. The poles and wires are to be located under the direction of a committee, appointed by the city council.

Section 3. All poles, wires and fixtures are to be placed so as not to interfere with the ordinary travel and traffic on the streets, alleys and public highways or shade or ornamental trees in said City of Mitchell; and are not to interfere with the flow of water in any main, sewer, or gutter in said city of Mitchell; and the City of Mitchell may adopt any reasonable rules and regulations of a police nature, as may be deemed necessary, not destructive, however, to the rights and privileges herein granted.

Section 4. The rights and privileges herein granted are not exclusive, and the said city of Mitchell reserves the right to grant the same rights and privileges to other parties, the same, however, not to interfere with the rights and privileges herein granted.

Section 5. In consideration of the above, the City of Mitchell shall have the right to string wires on the poles of the Dakota Central Telephone Lines for fire alarm purposes, said work to be superintended by the above company and such wires are not to interfere with the workings of the wires of the Dakota Central Telephone Lines.

141 Section 6. This ordinance shall be in effect, from and after the date of its passage and approval. Passed June 6th, 1904.

Approved June 7th, 1904.

GEO. A. SILSBY, *Mayor.*  
J. G. MARKHAM, *Auditor."*



And that said ordinance was duly published according to law.

### V.

That some years prior to the passage of said ordinances Nos. 174 and 180 the Dakota Southern Telephone Company, a partnership doing business in the State of South Dakota, had constructed long distance telephone lines into the City of Mitchell, South Dakota, but that the records of said City do not show that any ordinance or resolution was ever passed or adopted by the City Council of said City, and such records do not show that any other act was done consenting to or by which said City consented in any manner to the construction, use or operation of such long distance telephone lines into or through said City, or that said City ever in any way ratified or approved of any such construction, use or operation of such lines; that some time in 1903 the Dakota Central Telephone Lines purchased said long distance lines of the Dakota Southern Telephone Company, and on or about the 2nd day of October, 1904, said Dakota Central Telephone Lines sold said long distance lines into the City of Mitchell to complainant herein, and that complainant has owned and operated the same, together with new ones constructed by it, at all times since, and that plaintiff has never secured  
142 any consent or permission from the municipal authorities of said City of Mitchell to own, construct or operate any long distance telephone lines within the corporate limits of said city except as it may have consented thereto by the enactment and approval of said Ordinances Nos. 174 and 180.

### VI.

That on or about the 25th day of May, 1904, the said Dakota Central Telephone Lines Purchased from said F. B. Elce, the grantee named in said Ordinance No. 135, the local telephone exchange, constructed, owned and operated by said F. B. Elce, under and by virtue of said Ordinance No. 135, together with all the rights and privileges of said F. B. Elce under said ordinance; that said purchase was consummated on or about the 6th day of July, 1904, as hereinbefore recited in paragraph three, and that said Dakota Central Telephone Lines owned and operated the said local telephone exchange in said City of Mitchell until on or about the 2nd day of October, 1904; that on or about the said 2nd day of October, 1904, the said Dakota Central Telephone Lines sold, assigned and transferred to complainant said local telephone exchange together with all its rights, franchises and privileges to own, operate and conduct said local telephone exchange.

### VII.

That on or about the 10th day of April, 1907, the City Council of said City of Mitchell duly passed and the Mayor of said City approved a resolution, in words and figures as follows:

143 "Be it resolved, by the City Council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota



Central Telephone Company, their successors or assigns, to place, construct, and maintain through and under the streets, alleys and public grounds of said City all conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public in general communication by telephone and other improved appliances."

### VIII.

That without the request or consent of the defendant, the City of Mitchell, the complainant herein, during the latter part of the year 1912 and the first part of the year 1913, installed an automatic telephone system in the said City of Mitchell, South Dakota, and that prior thereto the said complainant constructed a fireproof telephone exchange building, and which building the said complainant now is and ever since its construction has been using as a telephone exchange building in said City.

### IX.

That on or about the 17th day of March, 1913, the defendant, the City of Mitchell, by its City Council in regular session assembled, passed, adopted and published the following resolutions:

#### Telephone Resolution.

Whereas the Dakota Central Telephone Company is maintaining, conducting and operating a local telephone system or exchange in the City of Mitchell, County of Davidson, South Dakota, under the rights and privileges granted in, and in accordance with the terms and conditions of Ordinance No. 135 of the City of Mitchell, South Dakota, being an ordinance entitled, "An Ordinance Granting to F. B. Elze, His Associates, Heirs and Assigns the Use of the Streets, Alleys and Public Grounds of the City of Mitchell, S. Dak., for the erection and maintenance of a Public Telephone System," and adopted the 11th day of May, 1908; and

Whereas, the rights and privileges granted by said Ordinance No. 135, by virtue of the limitation therein contained, will cease and terminate on the 11th day of May, 1913; and,

Whereas, the Dakota Central Telephone Company has failed and refused to accept the terms and conditions of Ordinance No. 305 of the City of Mitchell, S. Dak. granting to the said Dakota Central Telephone Company the privilege to conduct, maintain and operate a local system or exchange in the City of Mitchell, S. D., for a period of 20 years from and after the said 11th day of May, 1913; and

Whereas, the said Dakota Central Telephone Company has no other rights than those granted by said Ordinance No. 135, to construct, maintain and operate a local telephone system or exchange in the City of Mitchell, South Dakota; and,

Now Therefore, Be it hereby resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled duly and regularly called, this 17th day of March, 1913, that the right

and privilege of the Dakota Central Telephone Company, to construct, operate and maintain a local telephone system or exchange in the City of Mitchell, South Dakota, be and the same are hereby terminated from and after the 11th day of May, 1913; and

Be it further resolved that said Dakota Central Telephone Company shall have no right or privilege to construct, operate or maintain a local telephone system or exchange in the City of Mitchell, South Dakota; from and after the 11th day of May, 1913; and

Be it further resolved that said Dakota Central Telephone Company be, and it is hereby notified and requested forthwith on the 11th day of May, 1913, to remove from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota; and

Be it further resolved that the said Dakota Central Telephone Company be, and it is hereby notified and required that in case said company fails, neglects or refuses to comply with the provisions of this resolution and to remove from the streets, alleys, avenues and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota, as herein required, then the City Council of the City of Mitchell, South Dakota, will take such steps as may be

necessary to secure the immediate removal of said poles, wires, cables, fixtures and apparatus from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota; and

Be it further resolved that a copy of this resolution be served upon said Dakota Central Telephone Company, by sending a copy of same by registered mail, to J. L. W. Zettler, the President of said Company at Aberdeen, South Dakota, and that the City Auditor of the City of Mitchell, South Dakota, is hereby directed to forthwith mail a copy of this resolution by registered mail to said J. L. W. Zettler in accordance herewith; and

Be it further resolved that the mailing of a copy of this resolution by the City Auditor to the president of said company as herein required, and the receipt of such copy by said president shall constitute notice to said Dakota Central Telephone Company of the contents of this resolution and of the intention of the City Council of the City of Mitchell, South Dakota, relative to the matter herein contained.

Adopted and approved this 17th day of March, 1913.

A. E. HUTCHINSON, Mayor.

Attest,

N. H. JENNER,

City Auditor.

That at the same meeting said City Council adopted, and the Mayor approved two other resolutions as follows:

#### Telephone Resolution.

Whereas, the right of the Dakota Central Telephone Company to construct, maintain, and operate a local telephone exchange or system in the City of Mitchell, South Dakota, will cease and terminate on the 11th day of May, 1913; and,

147      Whereas, the City Council of the City of Mitchell, South Dakota, and the said Dakota Central Telephone Company have failed to agree upon the terms and conditions upon which the said company might continue to operate and maintain a local telephone exchange or system in the City of Mitchell, South Dakota, from and after the said 11th day of May, 1913; and

Whereas, the City Council of said city is desirous of protecting its rights in said matter.

Now Therefore, to protect its said rights and to avoid waiving said rights.

Be it Resolved by the City council of the City of Mitchell, South Dakota, in special session assembled, duly and regularly called this 17th day of March, 1913, that all the officers and employes of the said City of Mitchell, South Dakota, be and they are hereby directed and requested not to contract, either directly or indirectly with the Dakota Central Telephone Company, for any local telephone service from said company in the City of Mitchell, South Dakota, from and after the 11th day of May, 1913, until the controversy now existing between said city and the company have been adjusted, and they are further directed and requested to terminate, on the said 11th day of May, 1913, all relation existing on that date, between them and the Dakota Central Telephone Company relative to local telephone service furnished by said Dakota Central Telephone Company, in said City of Mitchell, South Dakota.

Adopted and approved the 17th day of March, 1913.

A. E. HITCHCOCK, *Mayor.*"

Attest:

N. H. JENSEN,  
*City Auditor.*

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#### Fire Alarm Resolution.

Whereas the right of the Dakota Central Telephone Company to construct, maintain and operate a local telephone system or exchange in the City of Mitchell, South Dakota, ceases and terminates on the 11th day of May, 1913; and,

Whereas, the said Dakota Central Telephone Company has heretofore furnished the City of Mitchell, South Dakota, all necessary fire alarm service.

Now therefore, be it resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled, duly and regularly called, that the City of Mitchell, South Dakota, purchase

and install a fire alarm system for said City of Mitchell, South Dakota, to be used from and after the 11th day of May, 1913; and

Be it further resolved that the city engineer of the City of Mitchell, South Dakota, be and he is hereby authorized and directed to prepare plans and specifications for a complete and adequate fire alarm system for the City of Mitchell, South Dakota, and to report said plans and specifications as soon as completed, to the City Council of the City of Mitchell, South Dakota.

Adopted and approved this 17th day of March, 1913.

A. E. HITCHCOCK, *Mayor*.

Attest:

N. H. JENSEN,  
*City Auditor.*

9 And that immediately after the passage of said resolution the said City Council caused a copy of the first of said resolutions above set out to be served upon the complainant herein.

## X.

That the Dakota Central Telephone Lines and the complainant herein, from the time of the purchase of said local telephone exchange in the City of Mitchell, South Dakota, from F. B. Elce, as hereinbefore set out, and up to the 11th day of May, 1913, has complied with the provisions of Section 3 of said Ordinance No. 135, which provided that the maximum rent for said telephone established under said ordinance should not exceed Two Dollars per month for each business telephone and One and 25/100 Dollars (\$1.25) per month for each residence telephone.

That on or about the 13th day of March, 1913, the said complainant filed the following petition with the Board of Railroad Commissioners of the State of South Dakota for the purpose of securing permission to increase the rental rates of said local telephone exchange in the City of Mitchell, South Dakota, to-wit:

"ABERDEEN, S. D., M'ch 17, 1913.

to the Honorable Board of Railroad Commissioners of the State of South Dakota, Pierre, S. D.

GENTLEMEN: In accordance with Sec. 10 of Chap. 207, of the 11 Session Laws, we hereby, file the following rates: the same to become effective May 12th, 1913, and applying at Mitchell, S. D.:

### *Long Distance Automatic Telephone Rentals.*

in Line Business rate .....	\$3.25	per Mo.
in Line Residence rate .....	2.25	" "
or Party Residence rate .....	1.75	" "
ling & Talking Extensions .....	1.00	" "
king Extensions .....	.50	" "

### Private Branch Exchange:

For each Main Line Trunk.....	3.00	"	"
For each Station connected to the Private Branch Exchange .....	.50	"	"

A discount of 25¢ per month to be made on all rentals paid at our office in the City of Mitchell, on or before the 10th of the month for the current month's rental, except Extension Telephones and Private Branch Exchanges, which will be net.

Yours truly,

DAKOTA CENTRAL TELEPHONE CO.,  
By W. G. BICKELHAUPT, *Sec'y.*"

That in opposition to said petition and prior to the hearing thereon, the defendant, the City of Mitchell, made a special appearance before said Board of Railroad Commissioners of the State of South Dakota, and objected to the jurisdiction of said Board on said matter; that said special appearance was made in writing and filed with the said Board and was in words and figures as follows, omitting formal parts, to-wit:

151 "Comes now the undersigned and appeared specially for and in behalf of the City of Mitchell, South Dakota, in the above entitled matter, for the purpose of objecting to the jurisdiction of the Board of Railroad Commissioners of the State of South Dakota, in said matter and for no other purpose.

The objection to the Jurisdiction of said Board in said matter is based upon the following grounds, to-wit:

1st. That the applicant, the Dakota Central Telephone Company has no franchise to maintain and operate a local telephone exchange within the corporate limits of the City of Mitchell, South Dakota, and that their franchise to so maintain and operate a local telephone exchange in said City of Mitchell, expired by express limitation in said franchise on the 11th day of May, 1913, and the same has not been renewed or extended and no new franchise has been granted to said company by the municipal authorities of said City of Mitchell, South Dakota.

2nd. That under and by virtue of the provisions of Article X, Section 3 of the South Dakota constitution, the City of Mitchell, South Dakota, has the exclusive right to determine exchanges within the corporate limits of said city, and under what terms and conditions the same shall be done, and the Board of Railroad Commissioners of the State of South Dakota has no power or authority to deprive the City of said right.

3rd. That the City of Mitchell, South Dakota, has ordered the said Dakota Central Telephone Company to remove from the streets, alleys and other public grounds, all of its wires, poles, and fixtures used in the operation of its said local telephone exchange, in said city, but that said company, in defiance of the said City's rights herein has refused and still refuses to comply with said orders, and said company is now operating its said local tele-

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exchange in said City without the City's consent, and in  
e of the wishes of said City and its inhabitants.

That the Dakota Central Telephone Company is now a tres-  
in the City of Mitchell, South Dakota, and the law should not  
any relief to trespassers.

That the Dakota Central Telephone Company is asking this  
to establish a schedule of long distance automatic telephone  
n the City of Mitchell, South Dakota, when in truth and in  
e telephone exchange operated and maintained in the City of  
ll, South Dakota, by the Dakota Central Telephone Company  
al exchange and not a long distance exchange, and in order to  
hat the said applicant's petition this board would be required to  
at the telephone exchange which enables a resident of said  
o talk over the telephone to his next door neighbor is a long  
e telephone exchange. And this Board has no Jurisdiction.  
e such findings."

t during said time and up to the 11th day of May, 1913, the  
inant herein complied with Section 3 of the Ordinance No.  
hereby the said F. B. Elce, his associates, heirs and assigns  
quired to provide a suitable and convenient place for a central  
and to maintain such office in operation during the business  
of each week during the year and at such other times as the  
ss might demand, and that said complainant, during said  
nd up to the 11th day of May, 1913, erected, maintained and  
ned three telephones for the said City of Mitchell, South  
Dakota, at such place as the City Council of said City directed  
without cost and expense to the said City, as required by Sec-  
tion Four of said Ordinance No. 135.

t for the purpose of computing the gross receipts of said local  
ge, as provided for in Section four of said Ordinance No.  
e defendant herein, and F. B. Elce, the grantee therein, and  
nplainant deemed the year to commence on the 1st day of  
f each year, and that for the year ending May 31, 1905, the  
eceipts of said local telephone exchange exceeded the sum of  
00, and that ten per cent of the said gross receipts in excess of  
00 for the said year amounted to the sum of \$300.00 and that  
nplainant herein voluntarily and without objection paid to  
l City of Mitchell the said \$300.00 as required by Section four  
Ordinance No. 135.

t the gross receipts of the said local telephone exchange for  
r ending May 31, 1906, exceeded the sum of \$2400.00, and  
n per cent of the said gross receipts in excess of \$2400.00  
ated to the sum of Four Hundred Twelve and 30/100 Dollars  
30), and that the complainant herein voluntarily and without  
on paid said \$412.30 as required by Section four of Ordinance  
5.

t the gross receipts of said local telephone exchange for the  
ding May 31, 1907, amounting to the sum of \$10,025.00, and  
year ending May 31, 1908, amounting to the sum of \$12,-  
and that for the year ending May 31, 1909, the said gross-

receipts amounted to the sum of \$13,253.30, and that for  
154 the year ending May 31, 1910, the said gross receipts  
amounted to the sum of \$14,882.35.

That in the year 1908 the complainant herein refused to pay the said ten percent of the gross receipts in excess of \$2400.00 for the years ending May 31, 1907 and 1908, and that the defendant herein thereupon brought suit against the said complainant for the said portion of said gross receipts, and that in said suit the said defendant herein secured judgment against the complainant herein for the said portion of said gross receipts, and that thereafter, during the year 1911, the complainant herein paid to said defendant the amount of said judgment and in addition thereto the said complainant voluntarily and without objection paid to the said City of Mitchell, the defendant herein, ten percent of the gross receipts of said local telephone exchange in excess of \$2400.00 for the years ending May 31, 1909, and May 31, 1910. That the gross receipts of said local telephone exchange in the City of Mitchell for the years ending May 31, 1911, May 31, 1912 and up to May 11, 1913, has exceeded \$2400.00 each year, and that complainant herein has refused to pay ten per cent of said gross receipts in excess of \$2400.00, as required by Section four of Ordinance No. 135 from the said 31st day of May, 1910, to the 11th day of May, 1913, for the reason that complainant claims that it is relieved from the payment of said charge by the provisions of Chapter 84 of the Session Laws of 1911 of the State of South Dakota, and particularly by Section 6 of said Chapter.

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## XI.

That prior to June 1, 1904, F. B. Elce, the grantee named in Ordinance No. 135, owned and operated the said local telephone exchange in the said City of Mitchell under and in accordance with the provisions of Ordinance No. 135, and the Dakota Central Telephone Lines owned and operated long distance telephone lines running into said City of Mitchell, South Dakota, and that said local telephone exchange and toll lines were owned and operated as separate and distinct telephone lines or exchanges. That the complainant herein now owns and operates, and ever since the purchase of said local telephone exchange and toll telephone lines by the complainant, as hereinbefore set out, has owned and operated the said local telephone exchange in said City of Mitchell and also the said toll telephone system or lines in said city.

That the said local telephone exchange, so owned and operated by the complainant herein, is a separate and distinct telephone system or exchange from the said toll system or lines so owned and operated by the complainant in that the said local telephone exchange furnishes facilities to the residents of said City of Mitchell to communicate with each other by telephone at a flat rate per month, and that in case any of the patrons or subscribers of said local telephone exchange desires to use the said toll system or lines they must first



156 be connected up to said long distance lines each time they so desire to use such system, and they are charged a special rate or toll for each of such services, the amount of such charges depending upon the distance of the said toll message transmitted and the length of time in transmitting such message, and that the said toll lines or system is used exclusively in transmitting and receiving toll messages coming from outside the city from and to inhabitants within the said city, and that the wires or lines of said local exchange are used only for local telephone service within the corporate limits of the said City, except when the same are connected to said toll system for the purpose of receiving or transmitting a toll message to or from outside of said city.

That a number of subscribers or patrons of said local telephone exchange, the exact number of which is unknown, have never used and never use the said toll system or lines for the service furnished thereby, and that said subscribers and patrons use said local exchange exclusively, but the toll lines are open to all subscribers on equal terms.

That since the installation of said automatic telephone system, hereinbefore mentioned, any subscriber or patron of the said local telephone exchange can automatically call up and transmit messages to any other patron or subscriber of said exchange within the limits of said city without the intervention of the central office of said exchange, but that no patron or subscriber of said local exchange can automatically call up any person outside of said city and transmit to such person any toll message without the intervention of a central office and without first being connected up to said  
57 long distance system by the long distance or toll operator at the central office of said long distance system.

## XII.

That on or about the 22nd day of September, 1908, the defendant herein, the City of Mitchell, together with A. E. Hitchcock, as Mayor, Clarion D. Hardy, John McDougal, John Michaels, P. M. Kelley, A. A. Truax, Joseph Koch, A. H. Doyle, and C. E. Reeves, as members of the City Council of said City of Mitchell, instituted an action in the Circuit Court of Davison County, South Dakota, against the complainant herein for the recovery of ten percent of the gross earnings, charges as provided in Section four of Ordinance No. 135 for the years ending May 31, 1907 and May 31, 1908.

That said action was duly tried before the said Circuit Court of Davison County, South Dakota, and findings of fact, conclusions of law and judgment were duly rendered by said Circuit Court in favor of the complainant herein; and that thereafter and in due time the defendant herein duly appealed from said judgment and conclusions of law to the Supreme Court of the State of South Dakota; and that hereafter, on the 24th day of May, 1910, the said Supreme Court of the State of South Dakota, duly rendered its decision in said action reversing the said judgment of the Circuit Court and directing said Circuit Court to amend its conclusions of law and judgment to con-

form with the decision of said Supreme Court, and to enter judgment for the said City of Mitchell as prayed for in the complaint in said action; and that thereafter the said Circuit Court duly  
 158 made and filed its amended conclusions of law and judgment in conformity with the said directions of said Supreme Court, and that thereupon the complain-t herein duly appealed from said judgment to the Supreme Court of the State of South Dakota, and that thereafter the Supreme Court of the State of South Dakota, on June 20, 1911, rendered its decision affirming the said judgment of the Circuit Court of Davison County, South Dakota.

That a true copy of the complaint, answer, reply, findings of fact, conclusions of law, judgment and notice of appeal, as originally made by the said Circuit Court of Davison County, South Dakota, in said action, are as follows:

### *Complaint.*

The plaintiffs for a cause of action complain and allege:

I. That plaintiff, the City of Mitchell, now is and at all times hereinafter mentioned has been a municipal corporation duly organized under the laws of the State of South Dakota, as one of the cities of said state.

H. That the plaintiff, A. E. Hitchcock, is the duly elected, qualified and acting Mayor of the City of Mitchell, South Dakota, and a member of the City Council of this city of Mitchell, and has been such since the fourth day of May, 1908, the plaintiffs, Clarion D. Hardy, John McDougal, John Michaels, P. H. Kelley, A. A. Truax, Joseph Koch, A. H. Doyle, and E. C. Reeves are the duly elected, qualified and acting aldermen of the City of Mitchell and members of the city council of said city of Mitchell, and have been  
 such from the fourth day of May, 1908.

159 III. That the defendant now is and at all times hereinafter mentioned has been a corporation duly incorporated and existing under the laws of the State of South Dakota.

IV. That the plaintiff, the city of Mitchell, by and through its common council, on the 11th day of May, 1909, passed and adopted the following Ordinance, known as Ordinance No. 135, of the City of Mitchell, South Dakota:

### **Ordinance No. 135.**

"An Ordinance Granting to F. B. Elce, his Associates, Heirs and Assigns, the use of the Streets, Alleys and Public Grounds of the City of Mitchell, S. D., for the Erection and Maintenance of a Public Telephone System.

Be it ordained by the City Council of the City of Mitchell, South Dakota:

Section 1. That in consideration of the benefits to be derived by the inhabitants of the City of Mitchell by the establishment of a public telephone system in said City, the said F. B. Elce, his as-

associates, heirs and assigns are hereby granted the right to the use of the streets, alleys and public grounds of the said City of Mitchell, S. D., for the erection and maintenance of a public telephone system for the term of fifteen years from the date of the adoption or approval of this ordinance.

Section 2. That for such purposes the said F. B. Elce, his associates, heirs and assigns may enter upon any of the streets, alleys and public grounds of the said City of Mitchell and erect poles and stretch wires, and erect such other appliances as may be necessary and proper for the establishment of such telephone system. Provided, that such poles, wires, and appliances shall not be  
160 so placed as to in any way interfere with the rights of owners of adjacent property, nor with the free passage of vehicles; and that lines or poles, wires, and other appliances, shall be located as far as possible in the alleys of said City. Provided further, that in no case shall the poles, wires and other appliances be placed on main street, except for the purpose of crossing said Main Street upon the streets running east and west. It is also provided that the said City Council shall have the right to direct the location of all poles and lines or wires upon the said streets, and the erection of all poles and lines or wires shall be under the direction and subject to the approval of the City Council of the said City of Mitchell.

Section 3. That the privileges herein granted are given under the following conditions, to-wit: That the said F. B. Elce, his associates, heirs and assigns, shall, within six months after the passage and approval of this ordinance, have at least twenty telephones in successful operation; that the said F. B. Elce, his associates, heirs and assigns, shall provide a suitable and convenient place for a central office, and shall maintain such office in operation during the business hours of each week day during the year, and at such other times as the business may demand; and the maximum rent for the said paying telephones established under this ordinance shall not exceed two dollars per month for business houses and one dollar and twenty-five cents per month for residence houses, for service within the city limits of the city of Mitchell; Provided, that if the said F. B. Elce, his associates, heirs and assigns shall  
fail or neglect to have at least twenty telephones in successful  
161 operation at the expiration of six months from the adoption and approval of this ordinance, then this ordinance shall be null and void, and all rights and privileges granted thereunder revoked.

Section 4. That in consideration of the said City of Mitchell granting to the said F. B. Elce, his associates, heirs, and assigns, the right and privilege to use the streets, alleys and public grounds of the said City of Mitchell, for the erection and maintenance of a public telephone system, the said F. B. Elce, his associates, heirs and assigns shall erect and maintain three telephones at such places as the City Council shall direct, and that the said three telephones shall be furnished to the said City during the term of fifteen years without cost or expense to the City of Mitchell; Provided, also that

at any time after three years from the adoption and approval of this ordinance that the gross receipts of the said telephone system for any one year shall be in excess of the sum of Two Thousand Four Hundred Dollars (\$2,400.00), the said F. B. Elce, his associates, heirs and assigns, shall pay to the City of Mitchell ten per cent of the amount in excess of Two Thousand Four Hundred Dollars (\$2,400.00) received as gross receipts from the said telephone system, which said sum shall be paid to the City at the end of each and every year, and the City Council shall have the right and privilege to examine the books of the said telephone system for the purpose of ascertaining the gross earnings of the said telephone system.

162 Section 5. That no exclusive right or privilege is hereby granted to the said F. B. Elce, his associates, heirs and assigns.

Section —. That if the said F. B. Elce, his associates, heirs and assigns shall fail to comply with any of the provisions of this ordinance then the City Council of the City of Mitchell, shall have the power to declare the privileges granted in this ordinance forfeited and revoked; Provided, that due notice of such intention shall be given by the said City Council to the said F. B. Elce, his associates, heirs and assigns, and a reasonable time thereafter shall be given him or them in which to comply with said provisions.

Section 7. This ordinance shall take effect and be in force from and after its passage, approval and publication.

Adopted and approved May 11th, 1898.

THOMAS FULLERTON, *Mayor*.

Attest:

J. K. SMITH,  
*City Auditor.*"

That said ordinance received a majority vote of the members of said common council in regular meeting assembled, that said ordinance was duly approved by the Mayor of said city on the 11th day of May, 1898, and was duly published, as required by law and went into effect on or about the said 11th day of May, 1898, as one of the ordinances of said city, and is now in full force and effect.

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V.

That F. B. Elce, the grantee in said ordinance No. 135, duly accepted the terms and conditions of said ordinance, and that under and in pursuance thereof the said grantee therein, F. B. Elce, installed a local telephone system in said City of Mitchell, S. Dak., and used and occupied the streets, alleys and public grounds and highways of said city with the poles, wires and fixtures, used in the operation of said telephone system, under the restrictions, limitations and conditions of said Ordinance No. 135; that the said F. B. Elce, within six months after the passage and approval and publication of said Ordinance No. 135, did have not less than twenty telephones installed and in successful operation in said city as

provided by said ordinance, and that said F. B. Elce conducted and operated said local telephone system in said City of Mitchell, South Dakota, in accordance with and under the terms and conditions of said Ordinance No. 135, until on or about the 3rd day of June, 1904.

## VI.

That on or about the 3rd day of June, 1904, the said F. B. Elce, for a valuable consideration, sold, conveyed, and assigned said local telephone *telephone* system together with all the poles, wires and fixtures used in connection therewith, and all the rights and privileges granted by said ordinance No. 135 to the grantee therein, his associates, heirs and assigns, to the Dakota Central Telephone Lines, a corporation duly incorporated and existing under the laws of the State of South Dakota, and by said conveyance the said Dakota Central Telephone Lines became bound by the duties, obligations and conditions of said Ordinance No. 135.

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## VII.

That on or about the 2nd day of October, 1904, the defendant corporation through mesne conveyances from the said Dakota Central Telephone Lines, for a valuable consideration, became the purchaser and owner of said local telephone system in said City of Mitchell, together with all the poles, wires and fixtures used in connection therewith, and of the rights and privileges granted by said ordinance to the grantee therein, his associates, heirs and assigns; and that said defendant corporation by said conveyance and purchase became bound by the duties, obligations and conditions of said Ordinance No. 135; that ever since said 2nd day of October, 1904, the defendant corporation has owned, operated and conducted said telephone system in said City of Mitchell, South Dakota, under said Ordinance No. 135, and said defendant corporation is now owning, operating and conducting said telephone system under said Ordinance No. 135.

## VIII.

That under and by virtue of the conditions and obligations in said Ordinance No. 135, and in consideration of the privileges and rights therein granted to the grantee, his associates, heirs and assigns, the defendant corporation became obligated to pay the said City of Mitchell, at the end of each and every year thereafter, the sum of ten percent. of the annual gross receipts in excess of the sum of \$2,400. received by the defendant from said local telephone system in said City of Mitchell, South Dakota.

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## IX.

That the gross receipts from said local telephone system for the year ending May 31st, 1902, exceeded the sum of \$2,400.00; that up

to and including the year ending May 31, 1904, the said F. B. Elce, grantee in said Ordinance No. 135, paid to said City of Mitchell, the said ten per cent of the amount in excess of said sum of \$2,400.00 received by him as gross receipts from said telephone system, and that for the years ending May 31st, 1905 and May 31st, 1906, the defendant corporation voluntarily and without objection paid to said City of Mitchell, the said ten percent of the annual gross receipts in excess of said sum of \$2,400.00 received by said defendant from said telephone system for each of the said years respectively.

### X.

That the gross receipts of the defendant corporation from said local telephone system in said City of Mitchell, for the year ending May 31, 1907, amounted to the sum of \$10,025.00; that ten per cent of said gross receipts in excess of said sum of \$2,400.00 for the said year ending May 31st, 1907, amounts to the sum of \$762.50; that no part of said sum has been paid by the defendant to the said City of Mitchell, although said sum became due and payable on the 1st day of June, 1907, and that there is now due and owing to the said City of Mitchell, from the defendant corporation, the said sum of \$762.50 for the said year ending May 31, 1907, under the provision of said Ordinance No. 135; that the plaintiff duly demanded payment of said sum from the defendant, but defendant  
166 wholly refused to pay said sum and denies all liability therefor under said Ordinance No. 135.

### XI.

That the gross receipts of the defendant corporation from the said local telephone system in the said City of Mitchell, for the year ending May 31st, 1908, amounted to the sum of \$12,092.75; that ten per cent of said gross receipts in excess of the said sum of \$2,400.00, for the said year ending May 31st, 1908, amounts to the sum of \$969.27; that no part of said sum has been paid by the defendant to the said City of Mitchell, although said sum became due and payable on the 1st day of June, 1908; that there is now due and owing to the said city of Mitchell, from the defendant corporation the sum of \$969.27 for the said year ending May 31st, 1908, under the provisions of said Ordinance No. 135; that the plaintiffs duly demanded payment of said sum from the defendant but defendant wholly refused to pay said sum and denies all liability therefor under said Ordinance No. 135.

Wherefore, plaintiffs demand judgment against the defendant for the sum of \$1,731.77 together with interest at the rate of seven per cent per annum on \$762.50 of said sum from the 1st day of June, 1907, and on \$929.27 of said sum from the 1st day of June, 1908, and for their costs and disbursements in this action.

LAURITZ MILLER,  
*Attorney for Plaintiffs.*

167 To the foregoing complaint the following answer and counterclaim were interposed, omitting title, venue and verification:

*Answer.*

I. Now comes the defendant and for answer to plaintiffs' complaint denies the allegations contained in the eighth paragraph hereof.

Defendant further denies the allegation contained in the ninth paragraph of plaintiffs' complaint wherein it is alleged "That for the years ending May 31st, 1905, and May 31, 1906, the defendant corporation voluntarily and without objection paid to said City of Mitchell, the said ten per cent of the annual gross receipts in excess of said sum of \$2,400.00 received by said defendant from said telephone system for each of the said years respectively."

II. Defendant for further answer alleges that on or about June 7th, 1904, the City Council of the City of Mitchell passed an ordinance in words and figures as follows:

"Ordinance No. 180.

An ordinance to grant permission to the Dakota Central Telephone Lines (Inc.), their successors or assigns, the right to erect poles and fixtures, and to string wires, for the purpose of operating a long distance telephone system, within and through the City of Mitchell, South Dakota.

Be it ordained by the City Council of the City of Mitchell, South Dakota:

168 Section 1. That there is hereby granted the right and privilege, given to the Dakota Telephone Lines (Inc.), their successors or assigns to erect poles, and string wires on any of the streets, alleys and public highways of the City of Mitchell, excepting Main, Park Avenue, Fourth and Fifth Streets, this exception, however, not to prohibit the crossing of Main, Park Avenue and Fourth and Fifth Streets, at right angles, where it is necessary, and maintain the same for a period of twenty years from and after the passage and approval of this ordinance, for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing in, near or at a distance from Mitchell, and all such rights to be continued on the conditions herein named.

Section 2. The poles and wires are to be located under the direction of a committee, appointed by the City Council.

Section 3. All poles, wires and fixtures are to be placed so as not to interfere with the ordinary travel and traffic on the streets, alleys and public highways or shade or ornamental trees in said City of Mitchell; and are not to interfere with the flow of water in any main, sewer or gutter in said City of Mitchell, and the city of Mitchell may adopt any reasonable rules and regulations of a police



nature, as may be deemed necessary, not destruction, however, to the rights and privileges herein granted.

169 Section 4. The rights and privileges herein granted are not exclusive, and the said City of Mitchell, reserves the right to grant the same rights and privileges to other parties, the same, however, not to interfere with the rights and privileges herein granted.

Section 5. In consideration of the above, the City of Mitchell, South Dakota, shall have the right to string wires on the poles of the Dakota Central Telephone Lines for fire alarm purposes, and work to be superintended by the above company and such wires not to interfere with the workings of the wires of the Dakota Central Telephone Lines.

Section 6. This ordinance shall be in effect, from and after the date of its passage and approval.

Passed June 6, 1904. Approved June 7, 1904.

J. C. MARKHAM, *Judice*.

That said ordinance as passed and approved superseded the ordinance set out in plaintiff's complaint and thereafter the defendant operated and maintained its telephone lines and exchange in the City of Mitchell under and by virtue thereof.

III. That thereafter and on or about the 19th day of April, 1907, the City Council of the City of Mitchell, passed a resolution as follows:

"Be it resolved by the City Council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, their successors or assigns, to place, construct and maintain through and under the streets and alleys and public grounds of said city, all conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the  
170 public in general, communication by telephone and other improved appliances."

That thereafter the defendant continued to and does now operate its telephone lines and exchange in the city of Mitchell under and by virtue of the consent granted by the city of Mitchell in said ordinance and resolution.

IV. That Section 50 of the Act of March 19th, 1907, and by Section 14 of the Act of March 7th, 1907, it was and is now provided that the taxes to be paid by telephone companies in this state be assessed and levied by the State Board of Equalization and that the taxes so assessed and levied "shall be in lieu of all other taxes." That by reason of such statutory provisions, all ordinances and resolutions of the City of Mitchell, providing for the payment of any tax by the defendant to said city, are in so far as they do provide for such tax, without authority of law and void.

That the City of Mitchell is without power or authority to levy, demand and receive from this defendant any tax, whatever, whether the same be by levy and assessment on its property situate in said city or by way of a per centum on its gross earnings, arising from its operation in said city.



Plaintiffs further replying to said counter-claim deny that the defendant protested against the payment of the said sum of Four Hundred Twelve and 30/100 dollars as "a franchise tax" for the year ending May 31st, 1906, and that said sum was paid by the defendant under threats of the officers of said city that it would invoke the powers reserved in Sec. 6 of the ordinance set out in plaintiff's complaint.

Plaintiffs further deny that said several sums were paid by the defendant to the said City of Mitchell, under pressure or duress or threats of any kind, and allege the fact to be that said sum for the years ending May 31st, 1905, and 1906, were so paid voluntarily and without objection by the defendant under the provisions of said ordinance No. 135 as set out in the complaint herein.

173 Plaintiff further replying to said defendant's counter-claim deny that the defendant during the years ending May 31st, 1905, 1906, 1907 and 1908, or at any other time, at the special instance and request of the City of Mitchell, furnished telephone service to the said City of Mitchell of the reasonable value of \$159.00 per annum, or of any other value, and alleges the fact to be that any telephone service furnished during said years to the city of Mitchell by the defendant, has been furnished to said city by virtue of and in compliance with the provisions of Section 4 of said Ordinance No. 135, as set out in the complaint herein; that said telephone service has been furnished by the defendant to the City of Mitchell under said Ordinance No. 135 free of any charge to said city, voluntarily and without objection by said defendant.

Plaintiffs further deny each and every other allegation of defendant's said counter-claim not herein otherwise admitted.

Wherefore, the plaintiffs pray that the said defendant's counter-claim be dismissed and that they have judgment as prayed for in the complaint.

LAURITZ MILLER,  
*Attorney for Plaintiff.*

On the 3rd day of December, 1908, said cause was submitted to the Court on an agreed statement of facts, and the following findings of fact and conclusions of law were made by the Court, on the 13th day of December, 1909, omitting venue and title:

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*Findings of Fact.*

I. That plaintiff, the City of Mitchell, now is and at all times hereinafter mentioned has been a municipal corporation duly organized under the laws of the State of South Dakota, as one of the cities of said state.

II. That the plaintiff, A. E. Hitchcock, is the duly elected, qualified and acting Mayor of the City of Mitchell, South Dakota, and a member of the City Council of the City of Mitchell, and has been such since the fourth day of May, 1908, the plaintiffs' Clarion D. Hardy, John McDougal, John Michaels, P. H. Kelley, A. A. Truax, Joseph Koch, A. H. Doyle and C. E. Reeves are the duly elected,

qualified and acting aldermen of the City of Mitchell and members of the City Council of said City of Mitchell, and have been such from the fourth day of May, 1908.

III. That the defendant now is and at all times hereinafter mentioned has been a corporation duly incorporated and existing under the laws of the State of South Dakota.

IV. That the plaintiff, the City of Mitchell, by and through its common council, on the 11th day of May, 1898, passed and adopted the following Ordinance known as Ordinance No. 135 of the City of Mitchell, South Dakota:

#### Ordinance No. 135.

(See pages 22 to 24.) (Transcript pages 159 to 162.)

that said ordinance received a majority vote of the members of said common council in regular meeting assembled, that said ordinance was duly approved by the Mayor of said City on the 11th day of May, 1898, and was duly published as required by law and  
175 went into effect on or about the 11th day of May, 1898, as one of the ordinances of said city, and is now in full force and effect. That said ordinance was regularly passed, approved and published.

V. That F. B. Elce, the grantee in said Ordinance No. 135, duly accepted the terms and conditions of said ordinance, and that under and in pursuance thereof the said grantee therein, F. B. Elce, installed a local telephone system in said City of Mitchell, S. Dak., and used and occupied the streets, alleys and public grounds and highways of said city with the poles, wires and fixtures used in the operation of said telephone system, under the restrictions, limitations and conditions of said Ordinance No. 135; that the said F. B. Elce within six months after the passage, approval and publication of said ordinance No. 135, did have not less than twenty telephones installed and in successful operation in said city as provided by said ordinance, and that said F. B. Elce conducted and operated said local telephone system in said City of Mitchell, South Dakota, in accordance with and under the terms and conditions of said Ordinance No. 135, until on or about the 3rd day of June, 1904.

VI. That on or about the 3rd day of June, 1904, the said F. B. Elce, for a valuable consideration, sold, conveyed and assigned said local telephone system, together with the poles, wires and fixtures used in connection therewith, and all the rights and privileges granted by said Ordinance No. 135 to the grantee therein, his associates, heirs and assigns, to the Dakota Central Telephone Lines, a corporation duly incorporated and existing under the laws of the State of South Dakota.

176 VII. That on or about the 2nd day of October, 1904, the defendant corporation through mesne conveyance from the said Dakota Central Telephone Lines, for a valuable consideration, became the purchaser and owner of said local telephone system in said City of Mitchell, together with all the poles, wires and fixtures

used in connection therewith, and of the rights and privileges granted by said Ordinance to the grantee therein, his associates, heirs and assigns; that ever since said 2nd day of October, 1904, the defendant corporation has owned, operated and conducted said telephone system in said City of Mitchell, South Dakota.

VIII. That the gross receipts from said local telephone system for the year ending May 31st, 1902, exceeded the said sum of \$2400.00 that up to and including the year ending May 31st, 1904, the said F. B. Elce, grantee in said Ordinance No. 135, paid to said City of Mitchell, the said ten per cent of the amount in excess of said sum of \$2400.00 received by him as gross receipts from said telephone system. That the taxes for the years ending May 31st, 1905 and 1906 were paid by defendant without protest, but on demand of the City in the ordinary course of business. That such payments were on the dates and in the amounts shown by the receipts given therefor as follows:

No. 1865.

CITY TREASURER'S OFFICE,  
MITCHELL, S. D., July 5, 1905.

Received of Dak. Cent. Tel. Lines, by C. E. Reeves, Manager,  
Three Hundred and No/100 Dollars for Franchise Tax,  
177 telephone lines, in full to June 1st, 1905.

H. R. KIBBEE,  
*City Treasurer.*

Original.

No. 2287.

CITY TREASURER'S OFFICE,  
MITCHELL, S. D., Dec. 3, 1906.

Received of Dakota Central Tel. Co., C. E. Reeves, Mgr., Four  
Hundred Twelve and 30/100 Dollars, for Payment on Franchise  
tax, year ending May 31st, 1906.

H. R. KIBBEE,  
*City Treasurer.*

IX. That the gross receipt- of the defendant corporation from said local telephone system in said City of Mitchell, for the year ending May 31st, 1907, amounted to the sum of \$10,025.00; that ten per cent of said gross receipts in excess of said sum of \$2400.00 for the said year ending May 31st, 1907, amounts to the sum of \$762.50; that no part of said sum has been paid by the defendant to the said City of Mitchell although said sum became due and payable on the 1st day of June, 1907; that the plaintiffs duly demanded payment of said sum from the defendant, but defendant wholly refused to pay said sum and denies all liability therefore under said Ordinance No. 135.

X. That the gross receipts of the defendant corporation from the

said local telephone system in the said City of Mitchell, for the year ending May 31st, 1908, amounted to the sum of \$12,092.75; that ten per cent of said gross receipts in excess of the said sum of \$2400.00 for the said year ending May 31st, 1908, amounts to the sum of \$969.27; that no part of said sum has been paid by the defendant to the said City of Mitchell, although said sum became due and payable on the 1st day of June, 1908; that the plaintiff 178 tiffs duly demanded payment of said sum from the defendant, but defendant wholly refused to pay said sum and denies all liability therefor under said Ordinance No. 135.

XI. That defendant corporation was chartered under the laws of South Dakota to construct, own and operate telephone lines in South Dakota and is now engaged in operating both local and long distance telephone lines in and to the City of Mitchell.

XII. That on or about June 7th, 1904, the City Council of the City of Mitchell passed an ordinance in words and figures as follows:

(See Pages 28-29.) (Transcript pages 167 to 169.)

That said ordinance was regularly passed, approved and published.

XIII. That thereafter and on or about the 10th day of April, 1907, the City Council of the City of Mitchell, passed a resolution as follows:

"Be it resolved by the City Council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, their successors or assigns, to place, construct and maintain through and under the streets and alleys, and public grounds of said city, all conduits, manholes, and cables proper and necessary for supplying to the citizens of said city and the public in general, communication by telephone and other improved appliances."

That said Resolution was regularly passed, approved and published.

XIV. Defendant having withdrawn that part of its counterclaim for telephone services, no findings are made thereon.

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### *Conclusions of Law.*

Upon said Findings of Fact, the Court finds as a matter of law as follows:

I. That the City of Mitchell was without power or authority to impose a gross earnings or charter tax as a condition of its consent to erect, construct or maintain telephone lines and exchanges in the City of Mitchell.

II. That that portion of the ordinance of May 11th, 1898, known as Ordinance No. 135 which imposes a gross earnings or franchise tax, is void.

IV. That the plaintiff is not entitled to recover in this action.

V. That the payment of the taxes for the years ending May 31st, 1905 and 1906 were voluntarily made under protest or by reason of threats or under duress.

VI. That the defendant is not entitled to recover on account of taxes paid for the years 1905 and 1906.

VII. That defendant is entitled to recover its costs and disbursements in this action.

Let judgment be entered accordingly.

By the Court:

FRANK B. SMITH, *Judge.*

Attest:

S. CATTRELL,

*Clerk of Circuit Court.*

180 Thereafter, on the 13th day of December, 1909, judgment was rendered on the foregoing findings, which judgment was entered on the said 13th day of December, 1909, and is as follows, omitting venue and title:

*Judgment.*

The above entitled cause having been submitted to the Court without a jury, and the Court having made and filed its findings of fact and conclusions of law, in which the court found that the plaintiff was not entitled to recover on the matter sued upon and that the defendant was not entitled to recover its counter-claim, and that the defendant was entitled to recover its costs and disbursements in this action.

Now therefore, on motion of T. H. Null, attorney for defendant, it is

Ordered and adjudged that the plaintiff's complaint and the defendant's counterclaim herein be dismissed, and the defendant, the Dakota Central Telephone Company, recover of the plaintiff, the City of Mitchell, its costs and disbursements in this action, taxed and allowed herein at \$—.

Granted December 13, 1909.

By the Court:

FRANK B. SMITH, *Judge.*

Attest:

S. CATTRELL,

*Clerk of Circuit Court.*

Thereafter, on the 14th day of June, 1910, Notice of Appeal was filed, and is as follows, omitting venue and title:

*Notice of Appeal.*

To T. H. Null, Attorney for Defendant in the above entitled action, and to S. Cattrell, Clerk of the Circuit Court in and for Davison County, South Dakota:

181 Please take Notice that the plaintiffs named in the above entitled action hereby appeal to the Supreme Court of the State of South Dakota, from that part of the judgment rendered by the above named Court herein and entered on the 13th day of



December, 1909, in favor of the above named defendant and against the said plaintiffs, which adjudges that the plaintiff's complaint herein be dismissed, and that the said defendant recover of the plaintiff, the City of Mitchell, its costs and disbursements in said action.

Dated this 10th day of January, 1910.

LAURITZ MILLER,  
*Attorney for Plaintiffs.*

Due and personal service, by copy, of the above notice of appeal, at the City of Huron, Beadle County, South Dakota, on this 11th day of January 1910, is hereby admitted.

T. H. NULL,  
*Attorney for Defendant.*

Due and personal service, by copy, of the above notice of appeal at Mitchell, County of Davison, State of South Dakota, on this 14th day of January, 1910, is hereby admitted.

S. CATTRELL,  
*Clerk of the Circuit Court of  
Davison County, South Dakota.*

and that a true copy of the said amended conclusions of law and judgment, as made and entered by the said Circuit Court of Davison County, South Dakota, in compliance with the directions of said Supreme Court are as follows:

(Omitting venue and title.)

182

*Amended Conclusions of Law.*

This action having been tried at the November term, 1908, of this court, before the court without a jury, and the Court having made Findings of Fact and Conclusions of Law therein, which are of record, and the court having, on the 13th day of December, 1909, rendered judgment thereon for the defendant and against the plaintiff, for the dismissal of the plaintiffs' complaint and for costs to the defendant, and in favor of the plaintiffs against the defendant, for the dismissal of the defendant's counterclaim; and the plaintiffs having duly appealed to the Supreme Court of the State of South Dakota, from that part of said judgment dismissing the plaintiffs' complaint and awarding costs to the defendant, and the said Supreme Court having on the 24th day of May, 1910, wholly reversed that part of said judgment appealed from, and the record in this cause having been duly remitted from said Supreme Court to this court with directions that this Court amend its conclusions of law to correspond with the opinion of said Supreme Court; and due notice of such remittance having been given to the defendant as appears by proofs now on file; and due notice of this application for these amended conclusions of law having been given and proof of such notice having been filed;

Now therefore, In compliance with said mandate of the Supreme Court and on motion of Lauritz Miller, attorney for plaintiffs, the conclusions of law heretofore made and filed in this cause are hereby amended to read as follows:

183

## I.

That the City of Mitchell had full power and authority to impose a gross earnings or franchise charge as a condition of its consent to erect, construct or maintain Telephone Lines and exchanges in the City of Mitchell.

## II.

That that portion of the ordinance of May 11th, 1898, and known as Ordinance No. 138 of the City of Mitchell, South Dakota, which imposes a gross earnings or franchise charge is valid.

## III.

That the ordinance of May 11th, 1898, and known as Ordinance No. 135, of the City of Mitchell, South Dakota, was not repealed or modified by the ordinance of June 7th, 1904, and known as Ordinance No. 180 of the City of Mitchell, South Dakota.

## IV.

That the ordinance of May 11th, 1898, and known as Ordinance No. 135 of the City of Mitchell, South Dakota, was not modified or repealed by the Resolution adopted by the City Council of the City of Mitchell, South Dakota, on the 10th day of April, 1907.

## V.

That the gross earnings or franchise charge imposed by the ordinance of May 11th, 1898, and known as Ordinance No. 135, of the City of Mitchell, South Dakota, is a charge in the nature of a rental fee for the use of the streets and alleys of the City of Mitchell, and is not a tax within the meaning of Section 2125 of the Revised Political Code of South Dakota, of the year 1903, and Chapter 184 64 of the Session Laws of South Dakota for the year 1907.

## VI.

That the plaintiffs are entitled to recover the amount sued for in this action.

## VII.

That the payment of the gross earnings charges for the years ending May 31st, 1905 and 1906, were voluntarily made by the de-

defendant, and that said payments were not made under protest or by reason of threats or under duress.

### VIII.

That the ordinance of May 11th, 1898, and known as Ordinance No. 135 of the City of Mitchell, South Dakota, is a binding contract between the City of Mitchell and the defendant herein, the Dakota Central Telephone Co., and such defendant is now estopped from pleading that the conditions in said ordinance No. 135 were ultra vires the City of Mitchell, South Dakota.

### IX.

That the defendant is not entitled to recover on its counterclaim on account of the gross earnings charges paid by it for the year- 1905 and 1906.

### X.

That the plaintiffs are entitled to recover their costs and disbursements in this action.

Let judgment be entered accordingly.

Dated at Mitchell, South Dakota, the 25th day of October, 1910.

By the Court:

FRANK B. SMITH,  
*Judge of Circuit Court.*

Attest:

S. CATTRELL,  
*Clerk of Circuit Court.*

185 Thereafter, on the 25th day of October, 1910, judgment was entered, and is as follows, omitting venue and title:

### *Judgment.*

This action having been tried at the November Term, 1908, of this court, before the Court without a jury, and the Court having made Findings of Fact and Conclusions of Law therein, which are of record, and the Court having, on the 13th day of December, 1909, rendered judgment thereon for the defendant and against the plaintiffs, for the dismissal of the plaintiffs' complaint and for costs to the defendant, and in favor of the plaintiffs against the defendant, for the dismissal of the defendant's counterclaim; and the plaintiffs having duly appealed to the Supreme Court of the State of South Dakota, from that part of the said judgment dismissing the plaintiffs' complaint and awarding costs to the defendant, and the said Supreme Court having on the 24th day of May, 1910, wholly reversed that part of said judgment appealed from, and the record in this cause having been duly remitted from said Supreme Court to this

Court with directions that this court enter judgment in favor of the plaintiffs for the amount found due and unpaid to said plaintiffs by the Ninth and Tenth Findings of Fact of this Court, and for costs, both in this court and in the Supreme Court; and due notice of such remittance having been given to the defendant as appears by the proof now on file; and due notice of application for this judgment having been given, and proof of such notice having been filed;

186 Now, therefore, in compliance with said mandate of the Supreme Court and on motion of Lauritz Miller, attorney for the plaintiffs,

It is ordered and adjudged, That the plaintiffs, the City of Mitchell, A. E. Hitchcock as Mayor, Clarion D. Hardy, John McDougal, P. H. Kelly, A. A. Truax, Joseph Koch, A. H. Doyle, and C. E. Reeves as members of the City Council of the City of Mitchell, South Dakota, have and recover of the defendant, Dakota Central Telephone Co., the sum of two thousand sixty-six dollars and thirty-two cents (\$2066.32) principal and interest, together with the sum of One Hundred Twenty-six dollars (\$126.00) costs on appeal, and the sum of \$21.50 dollars costs in this Court, which costs shall be taxed by the clerk of this Court and by him inserted herein, and that the defendant's counter-claim be and the same is hereby dismissed.

Dated at Mitchell, South Dakota, the 25th day of October, 1910.  
By the Court:

FRANK B. SMITH, *Judge.*

Attest:

S. CATTRELL,  
*Clerk of Circuit Court.*

That said judgment was appealed to and affirmed by the Supreme Court of the State of South Dakota on the 20th day of June, 1911, and the decision of said case is reported in 27 South Dakota, 509.

187 XIII. That on or about March 31, 1911, complainant caused to be presented to the City Council of said City of Mitchell, the following letter and application, and requested the passage of the said resolution which was presented to the said City Council by the complainant in connection with its said letter and application:

"31 March, 1911.

Mr. L. L. Ness, City Auditor, Mitchell, South Dakota.

DEAR SIR: As per our conversation yesterday I am sending you herewith communication addressed to your Council and also form of resolution which we would like to have you hand to some Alderman to be introduced at your next Council meeting to enable us to proceed with the contemplated work.

Respectfully yours,

DAKOTA CENTRAL TELEPHONE CO.,  
By J. L. W. ZEITLOW, *Pres.*"

"To the Hon. Mayor and City Council of the City of Mitchell.

GENTLEMEN: As we are very much crowded for facilities to take care of the present telephone service satisfactorily to ourselves as well as our subscribers, being on account of our outside construction getting old and is overloaded and our operating facilities being taxed to the limit.

188 Keenly realizing these conditions, over a year ago, we erected a new building and planned at the same time to install an up-to-date system to operate from the new building. On account of the adverse decision rendered, we do not feel warranted in expending such a vast amount of money for a new plant as we are in no position to fix a rate for service above the rate now in force at Mitchell without the consent of the Railroad Commission and as this Commission has often, altho' informally indicated that they did not care to take up telephone rate matters in insulated cities, unless cities in question demanded better and more service.

We asked your honorable body to join us in a petition to said Railroad Commissioners that they fix a rate which would net us 8% on the investment. That is, on the cost of the new plant.

As your honorable body has taken no definite steps in this matter and the season is rapidly advancing, we are naturally anxious to know what we may expect so as to plan accordingly. The demand for service is increasing and complaints of poor service reach us frequently altho' we are trying hard to avoid this. About ten days ago our Engineer visited your City under instructions to prepare plans which would temporarily relieve the congested condition. He now turns in an estimate which calls for an expenditure of a large sum of money without giving permanent relief. Some of the work planned by him however, can be of a permanent nature as it consists of underground work on some streets where there is none now. Also the placing of poles, and wires in unoccupied streets and alleys.

We would therefore respectfully petition your honorable body to pass a resolution allowing us to proceed with this work also  
189 designating the location of the underground work, poles and wires necessary.

Respectfully yours,

DAKOTA CENTRAL TELEPHONE CO.,  
By J. L. W. ZEITLOW, *President.*"

That the resolution referred to in the foregoing communication was as follows:

"Be it resolved, By the City Council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, its successors or assigns to place, construct and maintain in and under the streets and alleys and public grounds of said city, such underground conduits, manholes, cables, poles and wires as are necessary to properly supply the present demand for telephone service within said City of Mitchell; such conduits, manholes, cables, poles and wires to be located under the instruction of

the City Council or the proper committee designated for that purpose.

Be it further resolved that this City Council ask the railroad commission to fix a just and adequate rate for improved telephone service within this City such as will give the Dakota Central Telephone Company a just compensation taking into consideration the investment, expense of operation, depreciation and service rendered."

190 That said above petition of the complainant before said defendant, City of Mitchell, was refused and rejected by said City Council.

That thereafter on or about March 26th, 1912, the City Council of said City passed and adopted the following resolution:

"Whereas, the franchise of the Dakota Central Telephone Company to use the streets, alleys and public grounds in the City of Mitchell, South Dakota, for the erection and maintenance of a local telephone system, will expire May 11th, 1913, and

Whereas, the present franchise fixes the maximum rates that the Dakota Central Telephone Company may charge for telephone services within said City as follows:

\$2.00 per month for business houses, and \$1.25 per month for residence houses, and

Whereas, it will be necessary for the City Council of said City soon to grant a new telephone franchise to some company or person and to prescribe the terms and conditions of said franchise, and

Whereas, the City Council of said City now is, and for some time past has been engaged in a controversy with said Dakota Central Telephone Company relative to the rights of the City and the obligations of the Telephone Company regarding telephone matters, and also the terms and conditions upon which a new franchise might be issued, and

Whereas, the Dakota Central Telephone Company is now attempting to evade the provisions of the present franchise by contracting with individual subscribers for automatic telephones and for different rates than prescribed in said franchise,

191 Now therefore, Be it resolved by the City Council of the City of Mitchell, South Dakota, in special session duly assembled this 26th day of March, 1912:

1. That the City Council consider it a breach of good faith on the part of the Dakota Central Telephone Company to attempt to enter into special contracts with individual citizens of the City of Mitchell relative to the kind of telephones to be installed and the rates to be charged therefor;

2. That said city council considers such action on the part of the Dakota Central Telephone Company as an attempt to circumvent said Council and to force said Council into making an adjustment of said telephone matters with the said company on terms unfair to said city.

3. That said City Council considers that it has the power and authority, under the Constitution of the State and the decisions of both State and Federal courts to grant telephone franchises in the



City upon such terms and conditions as such council shall deem best including the power to prescribe the kind of telephone service to be furnished and the maximum rates which may be charged therefor;

4. That said City Council considers that any action on the part of individual citizens in contracting with said Dakota Central Telephone Company for the kind of telephone service to be furnished and the rates to be charged therefor, will greatly hamper and embarrass the said City Council in securing the best possible adjustment for the city of the telephone problem now confronting said City.

192 Adopted by the City Council of the City of Mitchell, this 26th day of March, 1912.

A. E. HITCHCOCK, *Mayor*.

Attest:

[SEAL.] N. H. JENSEN,  
*City Auditor.*"

*Resolution.*

Whereas, the Dakota Central Telephone Company is attempting to contract with the individual citizens of the City of Mitchell relative to the kind of telephone service to be furnished and the rates to be paid therefor,

Now therefore, be it resolved by the City Council of the City of Mitchell, S. D., in special session duly assembled this 26th day of March, 1912;

1. That said City Council hereby expressly disavows any consent to, or participation in, any of such contracts or proceedings, either on the part of said Telephone Company or on the part of any of the citizens of said city;

2. That said City Council shall in no manner, either directly or indirectly, expressly or impliedly, be held to consent to, or to have consented to, any agreement or contract by and between said Dakota Central Telephone Company and any of the citizens of said City relative to the kind of telephone service to be furnished the citizens of said city and the rates to be charged therefor;

3. That no contract or agreement made by and between said Dakota Central Telephone Company and any citizen of said city shall in any way be binding upon the City Council of said City, nor shall any such contract or agreement be construed to extend the scope or term of the present telephone franchise under which said telephone company is operating, nor to grant a new telephone  
193 franchise, nor to grant any additional rights or privileges to said Telephone Company other than the rights and privileges now enjoyed by said Telephone Company under the existing franchise;

4. That said City Council hereby reserves to itself, for the benefit of the whole City, all the rights, powers, duties and authority granted to it by the Constitution of the State and confirmed to it by the Courts relative to telephone matter, and said Dakota Central Telephone Company is hereby reminded that the City Council of the



City of Mitchell, S. D. is the constitutional body with whom negotiations for a new telephone franchise, or for privileges in relation to the use of the streets and alleys of said City must be considered;

5. That the City Auditor of the City of Mitchell, S. D. be, and he is hereby instructed to serve a copy of these resolutions, upon said Dakota Central Telephone Company by forthwith sending to the President of said Company a copy of these resolutions, by registered mail.

Adopted by the City Council of the City of Mitchell this 26th day of March, 1912.

[SEAL.]

A. E. HITCHCOCK, *Mayor.*

Attest:

N. H. JENSEN,  
*City Auditor."*

And that true copies of said resolution were duly served upon the said complainant before the said complainant began the installation of said automatic telephone system in said City of Mitchell.

It is agreed that this stipulation is made subject to any objection either party may have as to the materiality or relevancy of any of the facts stated therein.

194 It is further stipulated that the intent and meaning of the term "long distance telephone" as used in ordinance- 174 and 180 being one of the issues to be determined in this case, it is hereby stipulated that the use of the term "long distance" and "toll lines" in this stipulation shall not be considered as any evidence of the intent or meaning of said term "long distance telephone" as used in said ordinances, except as same may be considered where recited in said ordinances and other documents appearing in this stipulation in which case the intent and meaning of said terms are to be considered the same as if such documents were received in evidence independent of this stipulation.

SPANGLER & HANEY,  
NULL & ROYHL,  
*Solicitors for Complainant.*  
LAURITZ MILLER AND  
EDWARD E. WAGNER,  
*Solicitors for Defendant.*

*Evidence Submitted on Behalf of the Complainant.*

Mr. M. L. LANE.

Direct examination by Mr. Null:

I reside in Minneapolis and am commercial superintendent of the Northwestern Telephone Company, and have been engaged in the telephone business for more than twenty years, and my experience has covered all phases of the telephone business from lineman to

195 manager. From 1890 to 1908 I was familiar with the various types of telephone instruments and particularly with the form of telephone transmitter.

At this point it was stipulated that all testimony of this witness concerning the matter of the telephone in use during the time covered by his experience should be taken subject to the following objection made by the defendant. That such evidence is incompetent, irrelevant and immaterial, in that it does not tend to prove any issue in this case, and that it is an attempt to construe the meaning of the ordinances involved in this action by oral and extrinsic evidence, and that the meaning, scope and effect of such ordinances cannot be proved by such evidence.

Witness resumed as follows:

When I first engaged in the telephone business the "Blake Transmitter" was in use, the transmitter is that portion of the telephone which the user speaks into when using the telephone. The Blake transmitter consisted of a carbon button, a platinum point and a diaphragm and was found to be an efficient transmitter for transmitting messages a short distance, that is 20 or 25 or 30 miles. This instrument was in general use in local exchanges from 1889 to about 1904 or 1905. The type of transmitter now in use is what is known as the "long distance" transmitter, or "solid back." This transmitter was put on the market in 1893 at which time it began to be substituted for the Blake transmitter, but this substitution did not become general until about 1896, 1897 or 1898 in the entire United States, and in some localities it was in general use before that date. The solid back transmitter was first used for long distance business and as soon as its increased efficiency became generally known it was substituted for the old transmitters as rapidly as the manufacturers could produce them both in local and long distance work. This change was made between 1896 and 1904 or 1905. At first higher rate was paid for the use of the "solid back" transmitter than for the old type.

This question was then asked:

"With the Blake transmitter what was the custom,—What was the custom with reference to the subscriber in using the toll lines with reference to the telephone from which he would talk?

This was objected to as incompetent, irrelevant and immaterial, for the reason it don't tend to prove any of the issues in this case; for the further reason that no proper foundation has been laid, and it don't appear that the defendant is in any way bound by this custom; and for the further reason that it seeks to interpret the ordinances in question, in this litigation, by oral and extrinsic evidence outside of the ordinances themselves.

Answer. Both the representatives of the company and the subscribers, from actual experience, knew that it was impossible to carry on a satisfactory conversation for a considerable distance with this transmitter. And after the installation of the solid back transmitter the subscriber, in preference to attempting to talk through this transmitter, would come to the central office, or to such point as

the company had located one of its long distance transmitters, and use the long distance transmitter or solid back in the place of the Blake for a long distance conversation.

197 Mr. Miller: I move to strike out the answer of the witness wherein he recites that both the customer and the operators knew that it was impossible to talk over the Blake transmitter, for the reason the same is not responsive and a mere conclusion of the witness.

After the "solid back" transmitter had been installed in a subscriber's place of business, he was able to talk over longer distances without going to a central station than he could with the old Blake transmitter.

Q. Now, this solid back transmitter you have spoken of, what was the trade name by which such instrument was generally known among the telephone people?

Mr. Miller: Objected to as incompetent, irrelevant and immaterial and not tending to prove any of the issues in this case and no proper foundation has been laid for it and for the further reason it don't appear that the trade name of this instrument was taken into consideration at the time of the passage of the ordinance in litigation; and for the further reason it is in no way binding on this defendant, and that it is a mere attempt to prove the meaning, scope and effect of the ordinances of the City of Mitchell involved in this litigation, by oral and extrinsic evidence outside of the said ordinances themselves, and that this is not the proper method of proving such meaning, scope and effect.

A. Long distance transmitter.

Cross-examination by Mr. Miller:

I would not say I am an expert telephone man, but I think I am an experienced telephone man. The main difficulty in talking over long distance with the Blake transmitter was not  
198 that the voice would not carry, but that it would blurr or be indistinct and the carbon button was apt to break. The outside wiring used is the same for both transmitters, and there has been a gradual improvement in the telephone receiver and in all telephone apparatus. The "solid back" transmitter was patented in 1892, and they commenced the construction of long distance lines about that time. Prior to 1892 there was practically no long distance lines in the country. The telephone I am now working for has 730 telephone exchanges and the "long distance transmitter" is used exclusively in all of them for both local exchange work and for long distance work. As a matter of fact, this so-called long distance transmitter is an improvement over the Blake transmitter not only for long distance but for local exchange work, and the Blake transmitter is now obsolete. I have not known of any Blake transmitters in use anywhere since 1898. They were discontinued in Minneapolis & St. Paul about 1894 or 1895. All up to date exchanges have been using this

long distance transmitter for more than ten years, and any exchange that has not been using this transmitter during that time has been behind the times and have not been using the best and most approved and up to date telephone appliances on the market. This long distance transmitter is simply an improvement over what they formerly had in transmitters, the same as the present receiver is an improvement over the receiver they had ten or fifteen years ago.

199 The main difference between the Blake transmitter and the so-called "long distance transmitter" is that the Blake transmitter the induction coil had more resistance than in the Long Distance transmitter and the carbon in the former was a solid piece while the carbon in the latter was granulated and enclosed in a little water tight compartment.

CHARLES E. HALL.

Direct examination by Mr. Null:

I reside at Omaha, Nebraska, and now am and for thirty years have been engaged in the telephone business. For the past year I have been Vice President and general manager of the Iowa Company, the Nebraska Company and the Northwestern and for four years prior to that I was General Superintendent of those companies. I have been with the Iowa Company since 1884; during that time I have been familiar with the instruments in use in the telephone business.

The following testimony was submitted over defendant's objection that it was incompetent, irrelevant and immaterial, in that it don't tend to prove any of the issues in this case, and for the further reason that no proper foundation has been laid and that it is not binding on the defendant; and for the further reason it is an attempt to prove the scope, meaning and effect of the ordinances involved in this litigation by oral and extrinsic evidence outside of the ordinances themselves and this is an improper method of proving such meaning, scope and effect of such ordinances.

The early telephone instruments were equipped with magneto calls, transmitters, receivers and batteries. The Blake transmitter was in use in 1884, until June 1905, more or less; 200 their use gradually diminished along toward 1905, when none or very few were used. The capacity as to distance of the Blake transmitter depended upon the condition and character of the line, perhaps it was not over 50 or 75 miles over good iron lines. Long distance lines were generally constructed after 1894, and copper wire came into use in 1889 which would carry messages longer distances than the iron wire. The "solid back" transmitter did not come into extended use until about 1901 or 1902. They were first introduced in toll line business in 1893 and 1894. Prior to the time when the solid back came into general use, the subscriber had difficulty in talking up to 100 or more miles and he would generally go to the central office or long distance to talk, but after the solid back trans-

mitter had been furnished, the subscriber was generally able to talk over long distances from his office.

The subscribers of the Iowa Telephone Company prior to 1904, were supplied with the "solid back" or long distance transmitters as rapidly as the transmitters could be secured, and the rental charges for these were generally greater than for the Blake transmitter. During the time from 1893 to 1904 the "solid back transmitters" went under the trade name of "long distance telephones."

### Cross-examination.

By Mr. Miller:

When I first started in the telephone business they used an old style of Blake transmitter similar to the later Blake transmitter, the later Blake transmitter was an improvement over — and  
201 could transmit messages better and for a longer distance than the first Blake transmitter. Later there was a third Blake transmitter which was an improvement over all prior forms, and this in turn was superseded by the solid back. I have talked over two hundred miles with the improved Blake transmitter, but we could not get our subscribers to talk that far. We made our lines metallic in 1890 and 1891, and in 1895 we began to string copper wires and covered the state pretty generally with such lines, and in 1895, 1896 and 1897 we began to use the solid back transmitter. We do not call the transmitter now in use the granulated carbon transmitter, but it is held out to the world as the "solid back transmitter," as contradistinguished from the one which had the vibrating effect, so we have always spoken of it as the "solid back." We reported them as solid backs in our equipment between our shops. Our contracts are printed "long distance transmitters." The solid back transmitter was substituted for the Blake long distance type as fast as the former could be secured. As far as I know, all the local exchanges that I am familiar with are equipped with solid back transmitters and have been generally so equipped since the transmitters were placed on the market. All the different modifications and kinds of transmitters in general use now are based on the same principal as the solid back transmitter. I would say that this solid back transmitter is an improvement on the former as its predecessor was an improvement over the one it succeeded, and so on. The solid back transmitter is in use all over the country in both local exchanges and long distance lines, and the change to this type of trans-  
202 mitter was made as soon as it was perfected and could be supplied to the public. I do not know of any other transmitters in use that are built on the principal of the solid back and these transmitters may be attached to the same kind of apparatus and the same kind of wire circuits as other instruments are used on. There is no difference in the receiver used, except some improvement. It was a general custom throughout the state of Iowa for the local companies to use the same type of transmitter as we use for long distance work, and this is also true of the Nebraska and two Dakotas and

Minnesota. The solid back transmitter is not peculiar or incident to the condition of the long distance company.

J. L. W. ZEITLOW, testified as follows:

Direct examination by Mr. Null:

I am the president of the Dakota Central Telephone Company, and have been such president since its organization.

The following testimony was submitted over defendant's objection that it is incompetent, irrelevant; that it does not tend to prove any of the issues in the case and that it is in no way binding upon defendant; that no proper foundation has been laid, and further reason that it is an attempt by oral and *excentric* testimony to prove the meaning, scope and effect of ordinance No. 174 and 180, of the defendant city, and that this is not the proper method of proving the meaning, scope and effect of such ordinance, and that the language of the ordinances themselves is the only evidence of such meaning, scope and effect, and for the further reason that the meaning, scope and effect of such ordinance has been heretofore determined by the Supreme Court of the State of South Dakota.

203      Witness: The Blake transmitters were in common use from 1883 to 1905 and 1906. That is, they were used principally in the earlier period and gradually disappeared in the latter. They were used principally in telephone exchanges in short lines. The solid back transmitter was patented in 1892 by Anthony C. White. They were first used for long distance purposes and were gradually put in service in local exchanges the first I knew of it from 1890 to 1896, and from that time on they were substituted as far as they could be had. Prior to the time they came in general use, they were sometimes supplied specially to subscribers who wanted special or better service over long distances. These solid back instruments were known by the trade name of "long distance telephone instruments." A successful conversation could be heard through the Blake transmitter from a distance of 25 to 100 miles according to the other condition of the line and construction; with a solid back, you could talk over a thousand miles. My company began to install the solid back transmitter for general use in local exchanges from 1898 to 1906. I mean by that, that we after that time did not use any other transmitter. I was president of the Dakota Central Telephone Lines company in 1904.

The following evidence was submitted without objection:

At the present time the company's telephone lines extend west of the City of Mitchell to Chamberlain and south to Yankton and Niobrara. One group of lines extends from Mitchell to Parker, one to Salem and one to Heron Lake, Minnesota, and Marshall, Minnesota, and one to Edgerly, North Dakota, Ft. Yates, Larri-  
204      more and Fairmont, North Dakota. We also own the telephone lines extending east of Aberdeen to Ortinville, Minnesota, Browns Valley and Wheaton. There is a line between Mitchell and Aberdeen. Our company has some interstate busi-



ness between Aberdeen and Omaha, Sioux City and Omaha and Iowa and Nebraska points. The long distance business originating west of Mitchell passes through Mitchell, and the same is true of the business going to North Dakota. All through business from west and south of Mitchell is switched in Mitchell. All our toll lines passing through the city of Mitchell passes through the local exchange, but some of them are connected straight through. We do not have lines of our own extending to St. Paul or Minneapolis, but we handle that business by connection with the Northwestern telephone exchange at Salem, east of Mitchell, and at Yankton, South of Mitchell. I am familiar with the present exchange in Mitchell. It was completed in 1913, and is known as the automatic system. This system differs from the manual system in that in the automatic system the subscribers get into communication with one another without the interference of any operator or help at the central office. We used solid back transmitters in this exchange.

How are they classed with reference to long distance telephones or otherwise?

Mr. Miller: That is objected to as incompetent, irrelevant and immaterial, calling for a conclusion of the witness; that it  
205 don't tend to prove any of the issues in this case, and is in no way binding upon the defendant, and that it seeks to prove the meaning, scope and effect of ordinances number 174 and 180 of the City of Mitchell involved in this litigation, by oral and extrinsic evidence outside of the ordinances themselves, and that it is not the proper method of proving the meaning, scope and effect of such ordinances, and that the language of the ordinances themselves is the only evidence admissible in such case; and for the further reason that the Supreme Court of the State of South Dakota, has construed the meaning, scope and effect of such ordinances contrary to the contention of plaintiff in this action.

Answer. They are long distance transmitters and telephones. There are approximately between eleven and twelve hundred subscribers to the local exchange in Mitchell and about one-fourth of them are business telephones. The subscriber secures connections with the toll lines by inserting the finger in the place called "long distance" and rotating the dial to the stop and then letting the dial work back, and then the long distance operator puts the subscriber in connection with his party.

Cross-examination by Mr. Miller:

The carbon in the solid back transmitter performs practically the same office in the same way as the carbon did in the old Blake transmitters. In the old Blake transmitters the main difficulty was in getting the proper contact with the carbon and that difficulty has been overcome in the solid back transmitter. Wherever  
206 we put in a local exchange now, we put in solid back transmitters exclusively. The Blake transmitter are obsolete at this time, and I do not know whether they are longer made.



None of our companies' lines running through or from Mitchell are continuous into North Dakota, Minnesota, Iowa or Nebraska and when it is desired to send a long distance message either from or through Mitchell to any point in some other state, it is necessary to make one or more connections in the state outside of Mitchell.

Our company has about half a dozen long distance or toll stations in the City of Mitchell and any citizen of Mitchell could use the long distance telephone from any one of those stations regardless of the local exchange. The local automatic system or exchange in Mitchell could be removed without interfering with the long distance telephone business passing through Mitchell and the long distance wires in Mitchell terminate in the Central exchange office and are not used for local messages at all.

Exhibit A, being a portion of the telephone directory issued and used by the Dakota Central Telephone Company at the City of Aberdeen, South Dakota, and identified by the witness as containing instructions similar to those used in the company's other exchanges, was offered in evidence by defendant as a part of the cross-examination of Mr. Zeitlow. This exhibit among other things contained the following:

207 "14. All calls excepting the following, require that the dial be pulled four times; for these you will pull the dial but once:

4. Fire alarm.
6. Information Clerk.
8. Trouble Clerk.
9. Rural and Private Branch exchange operator.

Long distance, Toll operator."

"Long Distance Service.

Call No. "Long Distance."

This connects you with an operator who will take your call for points throughout the country, and will give rates. To make complaints, or for other information regarding the service, call Chief Operator No. 1411.

We reach over our own lines all Important Points in South Dakota, and connect with the Northwestern Telephone Exchange Company and the American Telephone and Telegraph Company through whom we reach all important points in the country."

When the operator answers which she will do by saying "Long Distance," first state your own name and number, and give the name of the person wanted, and the place, and other necessary directions for reaching him."

"Owing to the rapid increase in the size of this exchange, it is no longer possible for us to secure the O. K. of a subscriber, for the use of his telephone for Long Distance."

JOHN E. OSTLINE.

Direct examination by Mr. Null:

I am district wire chief of the Dakota Central Telephone Company, and have supervision of all local and long distance wires as well as the subscribers' instruments. I have been engaged  
208 in the telephone business for ten years and six months.

I was in the employ of the Northwestern Telephone Company in Minneapolis for about six months in 1906.

Q. While you were in Minneapolis, were there any Blake transmitters in use at that time?

Mr. Miller: That is objected to as incompetent, irrelevant and immaterial; that it don't tend to prove any of the issues in this case and is in no way binding upon the defendant, and that it seeks to prove the meaning, scope and effect of ordinances Number- 174 and 180 of the City of Mitchell, involved in this litigation, by oral and extrinsic evidence outside of the ordinances themselves, and that it is not the proper method of proving the meaning, scope and effect of such ordinances, and that the language of the ordinances themselves is the only evidence admissible in such case; and for the further reason that the Supreme Court of the State of South Dakota, has *constructed* the meaning, scope and effect of such ordinances contrary to the contention of the plaintiff in this case.

Answer. No, sir, there was not; not to my knowledge, there was not.

Witness further testified over the same objection as above, that the transmitter in use at that time was called the solid back long distance transmitter and that in the early days the instrument was designated as the "Blake Transmitter" and long distance transmitter, and many called it the solid back.

Cross-examination by Mr. Miller:

All transmitters now in use are of the solid back type, and this is used in all telephone work because it is the only kind they can get.

209 KEMPTON B. MILLER.

Direct examination by Mr. Null:

I have been connected with the telephone business for nearly twenty years, as examiner in the United States Patent Office, chief engineer of the Western Telephone construction Company, and Superintendent of the factory and member of the engineering corps of the Kellogg switch board and Supply Company, a large manufacturer of telephone apparatus. For the past ten years, I have been consulting member of the firm of McMeen and Miller and have designed and built large and small telephone exchanges. I am the author of American telephone practice and the joint author with S. G. McMeen of Telephony. I have been intimately connected with the telephone business since 1896, and was familiar with the transmitter formerly known as the Blake transmitter and also with

the solid back transmitter. The solid back transmitter was perfected about 1894, and was placed on the market to a limited extent shortly thereafter. From 1896 to 1898 while with the Western Construction Telephone Company they did not manufacture the Blake transmitter, but made a so-called granular carbon type.

After the solid back transmitters came upon the market this type of transmitter manufactured by the Bell Telephone Company were commonly called solid back transmitters. Independent concerns who made granular carbon transmitters sometimes referred to them

as solid back transmitters, because of their more powerful nature. These instruments in those days were frequently referred to as long distance instruments. I hardly think this was in the nature of a trade name, but was largely used to distinguish them from the less powerful type of instruments. The name solid back has clung particularly to the Bell instrument. Instruments of the granular carbon type were also in the early days often referred to as Hunnings type of instruments, after the name of the inventor of the granular carbon idea.

As the solid back instrument was brought out, the Chicago Telephone Company, a bell concern, sometimes replaced the Blake with the solid back, and charged an increased rate, and they were then commonly referred to as long distance instruments. Independent companies would commonly call the new and improved transmitters, long distance instruments. These were usually, if not always of the so-called granular carbon type. It was a common custom among both Bell and independent companies after adopting the more popular granular carbon instruments to herald them as long distance instruments. The manufacturers advertised these improved types of telephones as long distance instruments regardless of whether they were to be used for long distance or local service.

#### Cross-examination by Mr. Hitchcock:

The Blake instrument began to go out of use with the advent of the granular carbon type, which was very effectively used by the Bell Companies about 1893 or 1894, perhaps somewhat earlier. If in the year 1900 telephone directories had placed at the bottom of its pages these words: "Subscribers with a star before are furnished with a modern equipped telephone," that would have had the same meaning to me as the words "Long distance telephone." In the case of the telephone directory of the city of Topeka of 1903, which had on the second page of the first cover appears these two lines:

"Latest improved apparatus.

All long distance instruments."

I would say that the words, "All long distance instruments" meant some form of granular carbon instrument such as the solid back, and if these words had been omitted, they would have been included in the previous clause "latest improved apparatus" because that would carry with it the best type in telephone instrument then

known, which was the so-called granular carbon or long distance type, as that term was then used.

The telephone art has been a matter of development. The old form of Blake transmitter has gradually been superseded by improved forms capable of transmission over longer distances, and these being almost universally of the granular carbon type of which the solid back is a well known example.

From 1899 to 1904 while I was with the Kellogg Switch Board and Supply Company there were a large number of transmitters being placed on the market that were not of the solid back type. I think, however, that all, with possibly some exception, were of some form of granular carbon type. During this period my company and other independent companies were manufacturing and selling transmitters that were an improvement over the Blake Transmitter, and during this time the Kellogg company sold only one kind of transmitters for both local and long distance work. Some of the other companies sold several types of transmitters and 212 they sold them with some distinction implied. The American Electric Telephone Company, the Stromburg Carlson Manufacturing Company, the Swedish American Telephone Company, the Eurika Telephone Company, the Monarch Telephone Company, the Chicago Telephone & Supply Company, the Sumpter Telephone Manufacturing Company, all put upon the market during this time telephones other than the solid back type, but all were of the granular carbon type, and all were claimed to be superior to the Blake transmitter. The granular carbon form of transmitter was an improvement over the Blake Transmitter. The efficiency of the transmitter depends largely on the characteristics of the line and the resistance and other electrical characteristics of the line, and I know of cases today in purely exchange service, even the most powerful transmitters are not capable of giving good transmission from one side of a city to another on account of the resistance and other electrical characteristics of the line.

T. C. BURNS.

Direct examination by Mr. Null:

I live in Chicago and am president of the American Electric Company, and have been such president for the past six years. I have been in the electrical manufacturing business for the past thirty years. My company is the successor of the American Electrical Telephone Company, and is engaged in manufacturing telephone apparatus or supplies. I manufactured telephone instruments from 1893 to 1904 and for a few months during that time, I manufactured the Blake transmitters, and after which we manufactured the "Hunning" or granular carbon type up to 1898. I 213 advertised these transmitters as the "Hunnings" long distance telephones. After 1898 we advertised them for a period as "new solid back long distance type" and the "American Beauty Long Distance Type."

The name appears on some of these telephone plates as "American

local and long distance independent system," and in other cases, simply American Electric Company, Chicago." In 1899 and 1900, we manufactured a transmitter called the gold electrode. We put both of these on the market. The gold electrode and the American Beauty were improvements on the White solid back type. Most all telephones companies advertised the granular type of transmitter as "long distance." This was quite common by companies in opposition to the Bell Company, which company was using to a large extent inferior instruments, and only giving the long distance granular carbon type to a few subscribers at a higher rental, and in many cases we instructed our promoters to advertise the fact that our instruments were the long distance type, and we made this as one of the inducements to grant franchises for local exchanges.

Cross-examination by Mr. Hitchcock:

Between 1898 and 1904 we manufactured and sold a granular carbon type of transmitter, the Gold Electrode, and the American Beauty, and we called those two general forms of transmitters, "long distance instruments."

214 During that time I was familiar with the transmitter being used by the Kellogg Switchboard Supply Company, and they put out a form of the granular carbon type in 1890, which were not much of a success, and these were succeeded by their present transmitter in 1901. I do not know whether they called their transmitters "long distance telephones" or not, but they were generally considered as long distance instruments. These instruments were put on both local and long distance work. There were other companies manufacturing instruments at that time. Among them, were the Victor Manufacturing Company, the Eureka Telephone Company, the Swedish Telephone Company, the Stromberg Carlson Telephone Company, and the Farr Telephone Construction Company and the Western Telephone Manufacturing Company. The Victor people made a granular carbon transmitter, and advertised it as a long distance telephone. It was used both for local and long distance work. The Eureka Telephone Manufacturing Company manufactured the same type and also called it the long distance telephone transmitter. The same was true of the Swedish American Telephone Company and the Stromberg Carlson Company and the Farr Telephone Construction Company. The Western Telephone Construction Company manufactured the Blake form of transmitter from 1894 and 1895, after which they manufactured the granular type, and they all advertised their phones as long distance phones. There were no telephone manufacturing companies in the city of Chicago from the years 1898 to 1904 selling any telephone transmitters except the granular carbon type, except the American Bell Telephone Company were leasing another type, and during this period all transmitters manufactured and sold in the city of Chicago by the Western trade other than the Bell

215 telephones were the granular carbon type, and were generally designated as long distance telephones, and were used in

exchanges for both local and long distance communications. During this period the Belle Telephone Company manufactured and put in use the improved form of transmitter known as the "solid back" and they claimed it as an improvement over the Blake, and charged an extra rate for it. As far back as 1894, the Chicago Telephone Company itself claimed to the public that the solid back, the granular form of transmitter was superior to and an improvement over the Blake transmitter, and telephone engineers in general agreed with that claim. From 1898 to 1904 and later, the improved granular type of telephone transmitter was generally known as long distance phones.

ARTHUR BESSEY SMITH.

Direct examination by Mr. Null:

I reside at Evanston, Illinois, and am an electrical engineer. I first began this work in the early nineties, by buying telephone parts and assembling them into complete instruments and installing them on private lines. In 1901 I graduated from the course of electrical engineering from the University of Nebraska. I have been repair man and local manager, assistant manager, wire chief and in 1905 I had charge of a course in telephone engineering in Purdue University. Since 1909 I have been in Chicago devoting my time to research and development in the telephone art, and have published various articles on the art of telephony, and have published a couple of small books, one of which is entitled, "Modern Telephony."

216 I am now connected with the Automatic Telephone Company, and have been so for the past five years. This company produce the granular carbon type of transmitter. I am familiar with the Blake transmitter, with the solid back transmitter put out by the Western Electric Company, with the granular carbon transmitter, manufactured by the Independent manufacturers. I am also familiar with some of the trade names by which the independent manufacturers have called their transmitters of the granular carbon type from 1894 to 1904. Some of these were called "Hunnings" transmitter, others were called "solid backs", others "granular carbon", others "long distance", others "gold electrode", "American Beauty" and the like. Many of the manufacturers combined the term "long distance" with the other trade designation.

Most of the instruments produced by independent manufacturers designated as long distance telephones were efficient for use in long distance, and the transmitter produced by the American electric Company is fully equal to the other transmitters which have been mentioned. There are exchanges where the automatic exchange installed the transmitters are used by subscribers indiscriminately for both local and long distance service. I have recently made a search for authority in literature on the matter of the phrase "long distance telephone" as applied to the telephone instruments during the time from 1895 to 1904, and the following is the result of my investigations:



The Kellogg Switchboard & Supply Company in an advertisement January, 1903, stated

"That is why the Kellogg transmitter is guaranteed better than the Bell solid back."

Telephony, Vol. 5, No. 1, advertising page No. 4.

217 The Standard Telephone & Electric Company in an advertisement January, 1903, stated:

"Standard Telephones for exchange and long distance work are unequalled."

Telephony, Vol. 5, No. 1, advertising Page No. 19.

The Vought-Berger Company in an advertisement October, 1903, speaking of their "new series or bridging telephone No. 45" said:

"No. 45 is equipped as follows, Bell type solid back long distance transmitter mounted on hollow adjustable arm with double concealed cord; best bi-polar receiver concealed cord connections; silk wound long distance induction coil;"

Sound waves, Volume 6, No. 5, Page 45.

The Swedish American Telephone Company in an advertisement October, 1903, said:

"Long distance talking sets \* \* \* built with especial reference to long distance service."

Sound Waves, Volume 6, No. 5, Page 26.

Standard Telephone & Electric Company in an advertisement December, 1903, said:

"Standard No. 121 solid back long distance transmitter."

Sound Waves, Volume 7, No. 1, advertising Page III.

Acme Electric Company in an advertisement January 1904, said:

"This phone is equipped with our No. 2 long distance transmitter."

Telephony, Volume 7, No. 1, advertising page 18.

Kellogg Switchboard & Supply Company advertisement January, 1904, said:

"Kellogg Switchboard & Supply Company has given independent telephone \* \* \* VIII. The first improvement in transmission apparatus so as to equip all telephones, whether mangeto call or common battery, to the long distance service."

218 Telephony, Vol. 7, No. 1, Page 50.

Dean Electric Company in an advertisement November, 1904, said:

"This common battery wall set is provided with the Dean long distance transmitter and receiver and is wired with the most efficient talking circuit ever designed."

Telephony, Vol. 8, No. 5, advertising Page 13.

Central Electric Company, in an advertisement November, 1904, said:

"Our transmitters are the solid back type, clear and distinct."

Telephony, Vol. 8, No. 5, advertising page 32.



Sterling Electric Company in an advertisement November, 1904, said:

"No. 00 Transmitter for long distance work."

Telephony, Vol. 8, No. 5, advertising Page 47.

The Gemmill Telephone & Mfg. Co. in an advertisement November 1904, said:

"Reversed solid back transmitter greatest volume clearness quality.

\* \* \* You can hear better with our long distance loud speaking receiver with no exposed metal parts and permanent adjustment."

Telephony, Vol. 8, No. 5, advertising Page 87.

Cross-examination by Mr. Hitchcock:

The automatic electric company began to manufacture their present type and place them on the market about the year 1901 or '2. I do not know of the company having made any transmitter except the granular carbon type, and this transmitter has always been very efficient for both local and long distance work.

219 I do not remember the exact date when the granular carbon transmitter was first put on the market in Chicago, but I remember that as early as 1896 a more or less crude form of granular carbon transmitter, which was better than the Blake under certain conditions, was obtainable, but which did not compare in efficiency under all conditions with transmitters produced later. I am under the impression that the Kellogg Switchboard & Supply Company sold the first granular carbon transmitter before 1900, and that this transmitter at that time was used for both local and long distance service, and if in 1900 one had purchased a Kellogg Switchboard and Supply Company phone without any further designation he would have obtained a transmitter suitable for long distance purposes.

If in 1903 I had bought a telephone transmitter offered for sale by any reputable independent company in Chicago without any general specification as to long distance or otherwise, he would have obtained a transmitter of the granular carbon type, suitable for both long distance and local service.

As early as 1903 the art of telephony had been so developed that the Blake transmitter had become obsolete, and in the installation of telephone exchanges in cities of between five and ten thousand people, no other transmitter would have been considered other than some form of improved solid back or granular carbon. I do not know of any telephone exchange in the United States installed subsequent to 1900 in which any other form of transmitter was installed and supplied the same form of improvement then known as the solid back or granular carbon form.

220 J. O. STOCKWELL.

Direct examination by Mr. Null:

I reside in Chicago, and am a telephone expert, employed by the Chicago Telephone Company, with which company, I have been for about fifteen years, and have been with other Bell Companies con-

tinuously for thirty years. The Blake transmitter was the first practical transmitter gotten up and I first became acquainted with it in 1884. It was used extensively until about 1897, at which time they began to use the solid back. Up to that time the so-called "solid back" were only supplied to a few parties wanting a better class or louder instrument, for which a higher rate was charged. By the introduction of the measured service in Chicago in 1900 they soon had a great deal of the solid back instruments in use, but they continued the use of the Blake transmitters up to 1906. And at that time the courts ruled that under their franchise they had no right to charge any more for solid back than for Blake service, and for business reasons the company discontinued the Blake service.

The Chicago company in their directory indicated their subscribers who had a solid back instrument by a star, and a note at the bottom of the page saying that subscribers designated with a star had this improved service. I know of one exchange at St. Joe, Missouri, which as late as 1905 still had a number of Blake transmitters in use.

#### 221 Cross-examination:

During the year 1901 the Chicago Telephone Company ceased to put the note of designation at the foot of its directory on each page concerning improved transmitters. I couldn't fix a positive date when the Chicago Telephone ceased to install Blake Transmitters. I do not know of any exchange installed by a Bell company where the number of stations in excess of 500 in its western territory where the Blake type of transmitter was used in place of a solid back subsequent to 1900. In the engineer's service we have code numbers to distinguish the different apparatus. I think the solid back is sort of a nick-name for the instrument. We had an instrument that operated with granular carbon previous to the solid back, and they usually called it the long distance instrument. I can't tell positively when this solid back superseded what we called the long distance transmitter, but we had solid backs in service at the time of the Chicago World's Fair in 1893.

#### *Evidence Submitted on Behalf of Defendant.*

HIRAM D. CURIER.

Direct examination by Mr. Hitchcock:

I live in Chicago, Illinois, and am chief engineer of the Kellogg Switchboard & Supply Company. I first entered the telephone business in the employ in the supply department of the Chicago Telephone Company in 1897. I served there for one year and was then transferred to the engineering department and have been engaged in the engineering work designing and constructing and operating telephone apparatus since 1898. In 1901 I worked for the Maryland Telephone and Telegraph company in manufacturing and installing apparatus. In the latter part of 1901,

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I entered the employ of the Century Telephone Construction Company in Cleveland, Ohio, and was employed in designing transmitters. Six months after I moved to Chicago and took charge of the Eureka Electric Company plant. This company manufactured a complete line of telephone apparatus. In 1903, I went to work for the Western Electric Company and installed telephone exchanges in Kansas City and St. Louis.

I was next employed as chief engineer of the Duplex Metals Company. I was next with the Western Electric Company in a partial capacity and in September 1912 I went to the Kellogg Switchboard & Supply Company and had charge of experimental engineering. Since April 1914, I have been chief engineer of such company. My duties consist in the designing of telephone apparatus and detail specification work. Relative to the exchanges this company installs, I am familiar with the telephone instrument known as the Blake transmitter manufactured under patent of Bell, Edison and Berliner. I also am acquainted with the solid back transmitter. The Blake transmitter was a standard instrument adopted by the Bell Telephone companies and used in magneto exchanges, and I first became intimately acquainted with it in 1897. This transmitter was not applicable to common battery service wherein all the battery energy is located at the central office instead of substation instruments. The use of the Blake transmitter as a standard instrument was abandoned by the Chicago Telephone Company in 1898, at which time the  
223 first common battery exchanges were installed in Chicago.

The system then installed was adopted as a standard and the solid back transmitter was considered as a part of this standard common practice. The solid back type of transmitter using a granular carbon type of transmitter or "Hunning" type was available in 1901 from the following companies that I know of: Kellogg Switchboard & Supply Company, Stromberg-Carlson Manufacturing Company, Century Construction Company, Williams Abbott Electric Company and Western Electrical Company. The Blake transmitter was an instrument manufactured by the Bell Telephone Company and was not for sale but was licensed for use and a rental paid for same by the connecting companies.

In 1904 the States of Nebraska, Minnesota, Iowa, North and South Dakota, were supplied with telephone apparatus by Chicago manufacturers, who all had for sale a granular carbon solid back transmitter. None of them had any transmitter of the type of the Blake transmitter for sale. In the year 1904 the transmitters on the market were sold for both local and long distance purposes. The local battery system in use at that time would not permit of the use of a transmitter of the Blake design, it being considered as obsolete by all engineers.

#### Cross-examination by Mr. Null:

The Chicago Telephone Company was a subsidiary of the American Bell Telephone Company, and it did not use any equipment other than that manufactured by the Western Telephone Company,

which was a subsidiary Bell Company. It is my remembrance that the number of Blake transmitters in use by the Chicago Telephone

Company in 1897 were in excess of the solid back transmitters.

224 The Blake transmitter was not an efficient instrument for local use as compared with the solid back transmitter. Since 1898, I have had no experience with operations of the Blake transmitter in actual use because it was abandoned by the telephone art and no engineer desiring to attain efficiency would contemplate its use. By 1900 I would estimate that ninety-eight per cent of the transmitters in use in Chicago were of the solid back type.

While I was employed by the Chicago Telephone Company in installing new appliances there was no distinction made between the telephone designed for local use and those designed for long distance use. From 1898 to the present time every manufacture in the United States has made a long distance transmitter but these have in no manner been distinguished from transmitters designed for local use. The manufacturers designated these instruments as long distance *purposes*, but the same transmitters were installed on telephones used for house systems only. The manufacturers advertised that their transmitters could be used for long distance work, for the purpose of enlightening the subscribers that the instruments could be used for long distance purposes if necessary. The term "long distance" was a phrase coined by the Bell Telephone Company in an endeavor to detract from the mind of the subscriber the ability of the independent operating to give service to a distant point. The term "long distance" means to a subscriber remote points of communication because this phrase has been coined and is used to signify places far removed from each other. In all operative companies, if a subscriber desires to talk out of town they ask for long distance. The term "long distance" does not have any sig-

225 nificance with reference to whether the instrument is to be used in the toll line service or local exchange service for the reason that all telephones are supposed to be available for long distance service and as to whether the station can be used for long distance service depends upon the contract between the subscriber and the company. In our business we sell telephones where they are used for local house service only, and are never connected with a toll line, and we state that they are not long distance telephones, but the reason is not in the design of the instrument, but is in the use to which the instrument is put.

Each telephone that each manufacturer in the telephone field today produces and has produced since 1900 and known as a standard substantial instrument may be used for long distance purposes if it is put to that use. A telephone may be considered as a long distance telephone if it is designated to give long distance services. So far as the difference of construction is concerned, they are all constructed alike. To illustrate, if we install a telephone exchange and sell a man a thousand telephones they may all be used for long distance purposes, but if he desires to restrict the use of a portion of these telephones for certain kinds of service, he would not call them long distance telephones, although they were constructed iden-

tically alike. Since the abandonment of the Blake transmitter, subscribers desiring access to the toll lines have not been supplied with a special instrument for toll line use. Such occurrence did take place with the Bell Company prior to that time. There  
 226 some instruments placed at public pay stations prior to 1900 which were of the granular carbon style, known as the "solid back transmitter." The reason that Blake transmitters were left in use at stations which did not use a long distance service was because of the enormous investment in those old style of instruments. This ~~is true~~ only of the Bell Telephone Company. With the independent telephone companies, the granular carbon transmitter known as the Hunnings type was used at all stations whether long distance or not.

The phrase "long distance transmitter" was used to distinguish the stations that used long distance service, and as far as the economics of business permitted, these solid back instruments were installed throughout the system, and this was accomplished in Chicago in its entirety in 1900. The only telephone instruments with the inscription "long distance telephone" that I know of were made by the Bell Company, but its use was abandoned by the Chicago Telephone Company in 1900. I do not recall any such name plate on the Eurika Telephone. Some companies in the use of the term "long distance telephones" used the term only to prey upon the gullibility of the people, and not to define the efficiency of the instrument, because such instruments did differ in any regard from other telephones available.

Since I entered the telephone field in 1897, all the manufacturing companies which I have previously enumerated had the solid back transmitters only available, and they were furnished for both common battery and local battery work regardless of whether the instruments were to be used for long distance or not. For ex-  
 227 ample, there are any number of cases in the United States where exchange systems have been installed and the communications between subscribers has been limited to the corporate limits of the town, yet each instrument in the town was serviceable for long distance use, and the only reason it wasn't used for such purpose was the fact that the telephone company did not have toll lines.

A common battery exchange means an exchange system wherein all of the battery supply is placed at the central office. A magneto system contemplates a generating machine located in the substations with a crank on it, which the subscriber turns, thereby generating the necessary current. In a local battery system, the talking battery is located at the substations. In common battery systems, the talking battery is located at the central office.

Redirect examination by Mr. Hitchcock:

Since 1900 I have been connected with the larger representative manufacturers of telephone instruments, and I have never known of an instance where one telephone was sold for local town service

and another one for out of town service, or so-called, long distance service.

ALVA J. CARTER.

Direct examination by Mr. Hitchcock:

I live in Chicago and am sales manager for the Kellogg Switchboard and Supply Company. In the year 1896, I entered the telephone business as a lineman and continued in this employ until 1900. From 1900 to 1904, I was engaged in operating a 228 telephone exchange system in Corydon, Iowa, Seymour, Iowa and Ida Grove, Iowa. From 1904 to 1912, I was selling telephone apparatus for the Monarch Telephone Manufacturing Company, and from 1912 to the present time, I have been connected with the sales department of the Kellogg Switchboard and Supply Company. During that time I have become acquainted and familiar with various types of telephone transmitters including the Blake and solid back transmitters. I have travelled in South Dakota, Minnesota, Iowa and Nebraska, in the capacity of traveling telephone salesman and am familiar with the types of equipment used, and to my knowledge, the types of transmitters most generally used are those of the granular type. I do not know of any telephone manufacturing company since 1900 that has placed on the market two forms of telephone transmitters, one to be used for local exchange or within towns or villages, and the other for long distance or communications between towns and villages. I know of no dealer or manufacturer putting in a telephone system in cities of from five to ten thousand people, who would consider installing more than one kind of a telephone, which was to be used for both local and long distance work. I know of no dealer or manufacturer who since 1900 has put upon the market for sale any type of transmitter other than that known as the solid back or granular carbon transmitter.

229 Cross-examination by Mr. Null:

I began travelling for the Monarch Telephone Manufacturing Company and the Kellogg Switchboard & Supply Company in 1904. I have not seen any telephone instruments offered on the market which were designated on the name plate as "long distance telephones."

JOSEPH B. EDWARDS.

Direct examination by Mr. Hitchcock:

I am vice president and general manager of the Kellogg Switchboard & Supply Company. The company manufactures, sells and distributes telephone apparatus systems. From 1891 to 1900, I was connected with the Western Electric Company, Manufacturers. Since 1901, I have been with the Kellogg Switchboard & Supply Company, and directly connected with the manufacture of transmitters for the Western Electric Company until about January 1st,



1893. In April or May, 1893, I assumed the position of Superintendent of the Western Electric Shops at Antwerp, Belgium, and they were engaged exclusively in the manufacture and sale of telephone apparatus. Since 1893 I have had to do intimately with transmitters for the above company. In 1904, I was familiar with the various types of transmitters and telephone equipment used in the construction and operation of telephone plants, in the territory of United States west of Chicago, including the states of Nebraska, Iowa, Minnesota, North and South Dakota. I did not in the year 1904, nor have I at any time had any knowledge of the term "long distance" being applied to designate a special type of transmitter.

In 1893, the Western Electric Company manufactured a majority of Hunnings type of granular carbon transmitter.

The manufacturer of Blake transmitters being discontinued from October 1901 up to the time I entered the employ of the Kellogg Switchboard & Supply Company, we manufactured and sold only the Hunnings type of transmitters. There has never been at any time in our business any distinction made of transmitters for purely local or toll and long distance transmission between various towns. That is, we manufactured, sold and delivered only the Hunnings type of transmitter as one type for all purposes.

Cross-examination by Mr. Null:

I do not remember when the regular manufacture of the solid back transmitter was begun, but the Western Electric Company was manufacturing this transmitter in large quantities as regular production during the first part of 1893. During the time I worked for the Western Electric Company, beginning in 1895, solid back transmitters were used in telephones designated as long distance and also in telephones known as private or local telephones.

The term "equipped with long distance instruments" as used in the Chicago Telephone Company's directory dated June 1, 1894, I presume has reference to the more modern type of transmitters as they were replacing at that time the earlier type of Blake transmitter with the Hunnings or granular carbon, and I would say that this note means the Hunnings type of transmitter is distinct from the Blake transmitter. The common battery system came into use in 1898. The Blake type of instrument has not been

231 used in connection with the common battery system for the reason that this type of transmitter has become obsolete before the general use of common battery system. The manufacture of Blake transmitters was discontinued by 1898. All transmitters that I know of manufactured by independent manufacturers are designated as long distance transmitters. Independent manufacturers sometimes designated the Hunnings type as a long distance instrument.

Redirect examination by Mr. Hitchcock:

I do not recall that any distinction was made by the Chicago Telephone Company in its directory as late as 1900 between the various telephone instruments furnished to its subscribers. I can-



not tell the particular date when the Blake transmitter was entirely adandoned, but we have never come in competition with this type since 1901.

There would not have been any difference in the meaning of the language used by the various telephone companies if they had stated in their directories that all telephones are of modern equipment and style, and that all subscribers' telephones are telephones of modern equipment and style, instead of designating them as "long distance instruments." In 1899, the term "modern style of telephone equipment" would mean in every sense the same as to use the term "long distance instrument." As far as the manufacture and general sale of transmitters is concerned, the Blake type of transmitter *has* gone out of use before the common battery type of service had come in general use.

232 Recross-examination by Mr. Null:

The Blake transmitter has not been used to my knowledge with the common battery, but the solid back transmitter has been used with the local battery.

FRED B. ELCE.

Direct examination by Mr. Miller:

My name is F. B. Elce, and I live at Parker, South Dakota. I am the grantee named in the ordinance passed by the City of Mitchell on the 11th day of May, 1898, and known as Ordinance No. 135, the title of which is as follows: "An ordinance granting to F. B. Elce, his associates, heirs and assigns, the use of the streets, alleys and public grounds of the City of Mitchell, South Dakota, for the erection and maintenance of a public telephone system." Under this ordinance, I constructed a local system in the City of Mitchell, and operated until 1904, when I sold it to the Dakota Central Telephone Lines. At the time I sold the exchange I had different kinds of transmitters and phones. The first year I came in, I used the Victor, and kept buying different phones. I think I had a few American and Eureka and Kellogg phones. That is principally what I was using when I sold out. I had about four hundred phones at the time I sold out, and I had connection with long distance telephones after the first year. At the time I sold out I was connected with the Dakota Central Telephone Lines. They had headquarters at Aberdeen, and Mr. Zeitlow was at that time president of the company.

233 The telephone instruments I had in my local exchange at the time I sold out were used in talking over long distance lines when connected up. I could connect up with long distance lines to Sioux City, Sioux Falls and some to Minneapolis. There were not many calls at that time to Minneapolis, but there were some from travelling men. I had a little trouble in talking over long distance lines at the time I sold out depending on the distance and condition of the lines and the weather. The telephone instru-

ments that I had installed in my local exchange were the latest instruments used at that time. I do more or less talking over long distance telephones now. It is hard to tell about any difference in the ability to talk over the long distance with the present instrument and the instruments I had when I sold out to the Dakota Central Telephone Lines. The outside construction of the telephones lines has a good deal to do with the efficiency of the telephone. This construction at the time I sold out was not in good condition. We didn't have any metallic circuits and no copper lines. The long distance talk passed entirely over iron wires and grounded lines. In talking over the long distance line at that time it was my custom to connect the caller from his station to the long distance lines and he would then talk from his own local telephone. I did not have any Blake transmitters installed in my telephone exchange in Mitchell any time that I owned it. The transmitters I had in use in my local exchange were suitable for work over long distance lines at that time, and that is one of the purposes I purchased them for.

234 Cross-examination by Mr. Null:

The Kellogg instruments that I bought were manufactured by the Kellogg Company of Chicago. The transmitter used on the Kellogg instrument that I had at that time was called the solid back transmitter. The carbon was granulated and contained in a little disk. At the time I was operating this exchange we had some special instruments to do long distance work. I won't say whether these instruments were call-the Bell or the Western Electric, but they were generally known as the Bell instrument. I supplied none of those to my subscribers, but used them only in telephone booths. The Bell company furnished them and we had to pay rental on them. They were not for sale and they were generally supposed to be better for long distance work. Prior to the time I sold out, I was familiar with the catalogue and advertising matter of telephone manufacturers and I do not recall that any of the telephones I bought shortly before I sold out were called "long distance telephones." When I sold out, I had no Blake telephones and there were only two in booths, one at the Mitchell House and one at the Widman, and those were the big long-distance telephones.

When I first installed the exchange in 1898, I used the Victor telephones, manufactured by the Victor Manufacturing Company. It had a granulated carbon disk at that time, and was equipped with a felt pad. I only used these transmitters the first  
235 year I was here. I never bought any toward the last. The later phones that I had when I sold out did not bother me any. The Dakota Central Telephone Lines built the toll line to Mitchell in the spring of the year that I built, in 1898. They came in from the east—from Salem to Mitchell, and also built from Mitchell to Chamberlain, the next year and built south and met the Bell Company at Scotland, and built north to Woonsocket, and the years following that they built out in different directions, and this was done within a few years after I built my exchange.

I had had seven years of experience in the telephone business prior to that, and I had some customers who used the toll lines considerably, but I did not supply them with special instruments for that use. They had the same phones other people used. If they were any better it was because they were built later. In talking to Minneapolis, it frequently occurred that it was necessary for some operator along the line to repeat the conversation. That happened quite commonly in using the long distance.

Redirect examination:

At the present time conversations more or less have to be repeated by operators along the line in talking over long distances. The main difficulty we had talking over long distance at that time was because of the poor outside construction. Telephone instruments that I mentioned as placed in booths were long distance booths, and were operated by the people who owned and conducted the long distance lines into Mitchell at that time. I think half of the phones I had at the time I sold out were metallic solid back transmitters.

236 At the time I sold out and sometime before that, generally speaking, I put in a Kellogg phone, which was a solid back granulated carbon phone. I kept buying the best instruments that I could buy from the time I started in Mitchell until I sold out. I considered the instruments I bought from the Kellogg people as the best instrument I had. I could not say that the solid back transmitters, I put in at that time were known in the trade as "long distance transmitters."

GEORGE E. FOSTER.

Direct examination by Mr. Miller:

I live in Mitchell, South Dakota, where I have lived since the spring of 1897. I was register of the United States land office in 1904, at Mitchell, and was alderman from the third ward. I remember the passage of Ordinance No. 174 entitled, "An Ordinance to grant permission to the Dakota Central Telephone Lines, their successors or assigns, the right to erect poles and fixtures and to string wires for the purpose of operating a long distance system within and through the city of Mitchell, South Dakota. I also remember the passage of Ordinance No. 180 with the same title. I voted for the ordinances. At the time Ordinance No. 174 which was passed March 21, 1904, and Ordinance No. 180 passed June 7, 1904, I did not know anything about the various telephone instruments in use. I was not familiar with the various makes of telephone transmitters. I had never heard of telephone transmitters called the solid back transmitter, and I knew nothing about a telephone transmitter at that time which was sometimes called the "long distance transmitter," and I did not know that there was a telephone transmitter on the market called the "solid back" sometimes, and at others times called the "long distance transmitter" in the trade.

237

Q. What do you understand by "long distance telephone"?

Objected to as immaterial and incompetent.

Objection sustained, exception allowed.

A. My understanding of a long distance telephone was to connect different towns in different parts of the state so as to talk with people outside of Mitchell.

Q. That is what you understood by the term "long distance telephone" at the time of the passage of this ordinance?

Objected to as incompetent and immaterial and could not be received to interpret the ordinance.

Objection sustained. Exception allowed.

A. That is what I understood.

At the time of the passage of these two ordinances in question I had never heard of any distinction between the telephone instruments used in local exchanges and in long distance lines.

Cross-examination by Mr. Null:

When I was in the land office at Mitchell, we frequently called and talked over the long distance lines, but never went to a telephone booth.

Redirect examination:

The telephone we had in our office was the same as the telephones in general use in the city. We first had a wall telephone and next a desk telephone.

Recross-examination:

The wall telephone was contained in a large box.

238 A. J. KINGS.

Direct examination by Mr. Miller:

My name is A. J. Kings and I live at Mitchell, South Dakota, and have lived there since the spring of 1883. In 1904 I was a member of the City Council of the City of Mitchell, and I was a member of the City Council that passed Ordinance No. 180 of the city. I voted for that ordinance. At the time this ordinance was passed, I was not familiar with the various makes and kinds of telephone instruments in use, nor was I familiar with the trade names of any of the instruments, and I had never heard of a telephone transmitter called a "solid back" or "long distance transmitter."

Q. You may state what your understanding is of the term "long distance"?

Objected to as immaterial and incompetent. Objection sustained. Exception allowed.

A. I understand it as a line running from different towns and connecting the different towns in the country.

Q. Did you so understand the term "long distance telephone" at the time this ordinance was passed?

Objected to as immaterial and incompetent. Objection sustained. Exception allowed.

A. Yes, as connecting different towns around.

Q. You may state whether or not at the time this ordinance No. 180 was passed you intended as a member of the City Council to grant a franchise to the Dakota Central Telephone Lines for the purpose of owning and operating a local exchange in the City of Mitchell, South Dakota.

239 Objected to as incompetent and immaterial for the purpose of interpreting the ordinance. Objection sustained. Exception allowed.

A. I did not understand it as a local exchange. We already had one.

I think it was discussed frequently, we didn't want any more local exchanges.

#### Cross-examination:

I was a contractor and builder at that time. I did not have a telephone in my office, but had one at the residence, and occasionally talked over long distance. Sometime I would talk from my residence and sometimes from the booth in the local telephone office.

J. E. WELLS.

#### Direct examination:

My name is J. E. Wells, and I live at Mitchell, South Dakota, where I have resided since 1880. I have been in the abstract and insurance business since 1895. In 1904 I was a member of the city council of the city, and I can remember the passage of Ordinance No. 180, and I voted for the passage of such ordinance. At that time I was not familiar with the various makes of telephone instruments in use at the time this ordinance was put up for passage. I had never heard of a telephone instrument called the "solid back transmitter" and sometimes called the "long distance transmitter."

Q. State what your understanding of the term "long distance" is?

240 Objected to as incompetent and immaterial, and no foundation laid for it. Objection was sustained. Exception allowed.

A. It is a telephone connection from one town to another.

Q. That was your understanding of that term "long distance telephone" at the time these ordinances were passed, was it?

Objected to as immaterial and incompetent. Objection sustained. Exception allowed.

A. That is the way I remember it.

Q. As far as you remember, Mr. Wells, did you intend at the time you voted for these ordinances to grant to the Dakota Central

Telephone Lines a franchise for the purpose of owning and operating a local telephone system or exchange in the City of Mitchell?

Objected to as immaterial and incompetent and cannot be received for inferring the interpretation of ordinances. Objection sustained. Exception allowed.

A. It wasn't my idea at the time.

Q. Your understanding was that they were simply getting a long distance franchise to connect the city with places outside the city by telephone.

Objected to as incompetent, immaterial and cannot be received for the purpose of inferring the interpretation of the ordinance.

Answer: Yes, sir.

241 Cross-examination by Mr. Null:

I had a telephone at my place of business at that time and used it frequently for long distance conversations. I do not remember the general make up of the phone, only that it was a phone used at that time. It had a larger box than the one I had at the residence. I do not remember what the reason was for passing the second ordinance.

Redirect examination:

We had four wards in the city at that time and they were represented by two aldermen in each ward, and there were, therefore, eight members on the city council at that time.

A. J. CURTIS.

Direct examination by Mr. Miller:

My name is A. J. Curtis. I live at Mitchell, South Dakota, and have lived here since 1892. In 1904 I was an alderman and member of the city council, and I remember the passage of ordinance No. 174 and ordinance No. 180. At the time these ordinances were passed, I was not familiar with the various kinds of telephone instruments in use here for local or long distance work. Neither was I familiar with the telephone transmitter called the "solid back transmitter", and sometimes called "long distance transmitter." I did not know that there was any difference in the transmitters used for local work and transmitters used for long distance work. Neither was I familiar with the transmitter called the Blake transmitter.

Q. What do you understand by the term "long distance telephone?"

242 Objected to as immaterial and incompetent and no proper foundation laid for it. Objection sustained. Exception allowed.

A. Long distance would be to telephone to places outside of the city—to other towns.



Q. Was that the understanding you had of the term "long distance" at the time these ordinances were passed?

Objected to as immaterial and incompetent for the purpose of interpreting the ordinance.

A. Yes sir, that was my understanding at that time that it was for long distances to connect with other towns and people at a long distance.

I think I voted for the passage of ordinance No. 180.

Q. Did you intend as a member of the city council in voting for the passage of Ordinance No. 180 to grant to the Dakota Central Telephone Company the right and privilege of owning and operating a local telephone system or exchange within the City of Mitchell, South Dakota?

Objected to as immaterial and incompetent and inadmissible for the purpose of interpreting the ordinance. Objection sustained. Exception allowed.

A. I didn't vote with the understanding that they were to have any local telephone. It was long distance. What the ordinance called for was long distance and communication outside of the city.

Cross-examination by Mr. Null:

I was in the livery business at that time. I had a telephone at my place of business and also at my residence. The one at the residence was the same as at my place of business. I used the toll  
243 lines and my patrons used it, but I don't remember very much about it.

GEORGE A. SILSBY.

Direct examination:

My name is George A. Silsby. I live at Mitchell, South Dakota, and have been in Mitchell between thirty three and thirty four years. In 1904 I was Mayor of the City of Mitchell. I remember the passage of Ordinance No. 180 in 1904, which as Mayor I signed. At the time I was not familiar with the various telephone instruments that were in general use, the technical construction, nor their names, and I was not familiar at that time with any of the instruments, nor the name they went by. I didn't know whether they were called "long distance transmitters" or "solid back" or "Blake transmitters" or anything else. At the time I signed these ordinances my best recollection now is that I did not know that Dakota Central Telephone lines had purchased or were negotiating for the purchase of a local telephone system or exchange from F. B. Elce. Neither do I know that the other members of the council had any knowledge of such proposition at that time.

Q. Mr. Silsby, what do you understand by the term "long distance telephone?"

Objected to as immaterial and incompetent and no proper foundation laid for it. Objection sustained. Exception allowed.



A. The facilities for connecting between points or between different towns and cities.

244 Q. Did you understand that if I phoned from the office up to your office at the Elks that that would be a long distance telephone or do you mean to say the points should be in different localities or towns?

Objected to as immaterial and no proper foundation has been laid for it. Objection sustained. Exception allowed.

A. Generally speaking, I should understand it as between different towns.

Q. Was that the understanding you had of "long distance telephones" at the time you signed these two ordinances I have heretofore mentioned?

Objected to as incompetent and immaterial, and no proper foundation laid for it. Objection sustained. Exception allowed.

A. I think it was. That was my understanding at that time.

Q. Then as far as you know that was the understanding of the other members of the council, was it not?

Objected to as immaterial and incompetent and no proper foundation laid for it.

A. I think that that was the sense of the council.

Q. In the passing of these ordinances the city council at the time as you understood it, did not intend to grant a franchise to the Dakota Central Telephone Lines to own and operate a local telephone system or exchange in the city.

245 Objected to as immaterial and incompetent and cannot be received for the varying of the interpretation of the ordinance.

A. No sir.

LAURITZ MILLER,

EDWARD E. WAGNER,

*Attorneys and Solicitors for Defendant.*

(Endorsed:) Filed April 1, 1916. Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

In the District Court of the United States, District of South Dakota,  
Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation, Com-  
plainant,

vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

*Certificate of Judge.*

UNITED STATES OF AMERICA,  
District of South Dakota,  
Southern Division, ss:

I, Wilbur F. Booth, Judge of said Court, sitting in the above  
entitled suit by appointment in lieu of Hon. Jas. D. Elliott, Judge  
of the United States District Court for the District of South Dakota,  
disqualified, hereby certify that the foregoing statement of evi-  
dence contains all of the material evidence received upon the trial  
of said case, and is a true, complete and properly prepared statement  
of evidence offered or received on behalf of either party to said suit,  
and I hereby allow and approve the same.

246 Dated this 6th day of May, A. D., 1916.

WILBUR F. BOOTH,  
United States District Judge.

(Endorsed:) #5. S. D. Equity—Dakota Central Tel. Co. v.  
City of Mitchell—Statement of Evidence—Filed May 8, 1916.  
Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

And, to-wit, on the 4th day of April, A. D. 1916, there was  
filed in the office of the clerk of said court Assignment of Errors;  
which said Assignment of Errors is in words and figures the fol-  
lowing, to-wit:

247 In the District Court of the United States, District of South  
Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation, Com-  
plainant,

vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

*Assignment of Errors.*

Now comes the defendant in the above entitled cause and files  
the following assignment of errors upon which it will rely upon its  
prosecution of the appeal in the above entitled cause, from the decree  
made by this Honorable Court on the 14th day of September, A.  
D., 1915.

## First.

That the United States District Court for the District of South Dakota erred in taking and entertaining jurisdiction of this suit; that said Court did not have jurisdiction to hear and determine the same for the following reasons:

(a.) Because the Resolution of the defendant City of March 17th, 1913, the enforcement of which plaintiff seeks by this suit to enjoin, is not a law and did not, and does not have the force or effect of a law of a state, impairing the obligations of a contract, within the meaning of Section 10, Article 1, of the Constitution of the United States.

(b.) The Supreme Court of the State of South Dakota has considered and decided that a resolution of a city council in said state, is not of equal dignity with and does not operate as a repeal of, an ordinance enacted by a city council, and such decision is conclusive of this question and binding upon the Federal Courts.

248 The Resolution herein referred to is as follows:

## "Telephone Resolution.

Whereas, the Dakota Central Telephone Company is maintaining, conducting and operating a local telephone system or exchange in the City of Mitchell, County of Davison, South Dakota, under the rights and privileges granted in, and in accordance with the terms and conditions of Ordinance No. 135 of the City of Mitchell, South Dakota, being an ordinance entitled, "An Ordinance Granting to F. B. Elce, his Associates, Heirs and Assigns the Use of the Streets, Alleys and Public Grounds of the City of Mitchell, S. D., for the erection and Maintenance of a Public Telephone System," and adopted the 11th day of May, 1898; and,

Whereas, the rights and privileges granted by said Ordinance No. 135, by virtue of the limitation therein contained, will cease and terminate on the 11th day of May, 1913; and,

Whereas, the Dakota Central Telephone Company has failed and refused to accept the terms and conditions of Ordinance No. 305, of the City of Mitchell, S. D., granting to the said Dakota Central Telephone Company the privilege to conduct, maintain and operate a local telephone system or exchange in the City of Mitchell, S. D., for a period of 20 years from and after the said 11th day of May, 1913; and,

Whereas, the said Dakota Central Telephone Company has no other rights than those granted by said Ordinance No. 135, to construct, maintain and operate a local telephone system or exchange in the City of Mitchell, South Dakota; and

249 Now therefore, be it hereby resolved by the City Council of the City of Mitchell, South Dakota, in special session assembled duly and regularly called, this 17th day of March, 1913, that the right and privilege of the Dakota Central Telephone Company, to construct, operate and maintain a local telephone system or exchange in the City of Mitchell, South Dakota, be, and the

same are hereby terminated from and after the 11th day of May, 1913; and,

Be it further resolved that said Dakota Central Telephone Company shall have no right or privilege to construct, operate or maintain a local telephone system or exchange in the City of Mitchell, South Dakota, from and after the 11th day of May, 1913; and

Be it further resolved that said Dakota Central Telephone Company be, and it is hereby notified and requested forthwith on the 11th day of May, 1913, to remove from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota; and,

Be it further resolved that said Dakota Central Telephone Company be, and it is hereby notified and required that in case said company fails, neglects or refuses to comply with the provisions of said resolution and to remove from the streets, alleys, avenues and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance

250 and operation of its local telephone exchange or system in the City of Mitchell, South Dakota, as herein required, then the City Council of the City of Mitchell, South Dakota, will take such steps as may be necessary to secure the immediate removal of said poles, wires, cables, fixtures and apparatus from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota; and,

Be it further resolved that a copy of this resolution be served upon said Dakota Central Telephone Company, by sending a copy of same by registered mail to J. L. W. Zeitlow, the President of said Company at Aberdeen, South Dakota, and that the City Auditor of the City of Mitchell, South Dakota, is hereby directed to forthwith mail a copy of this resolution by registered mail to said J. L. W. Zeitlow in accordance herewith; and

Be it further resolved that the mailing of a copy of this resolution by the City Auditor to the President of said Company as herein required, and the receipt of such copy by said president shall constitute notice to said Dakota Central Telephone Company of the contents of this resolution and of the intention of the City Council, of the City of Mitchell, South Dakota, relative to the matter herein contained.

Adopted and approved this 17th day of March, 1913.

A. E. HITCHCOCK, *Mayor.*

Attest:

N. H. JENSEN,  
*City Auditor."*

The District Court erred in adjudging and entering its decree that plaintiff is and since June 7th, 1914, has been rightfully and

lawfully maintaining and operating under the rights and privileges granted to the Dakota Central Telephone Lines, (Inc.) by Ordinance No. 180 of the defendant City, two separate and distinct telephone exchanges or systems, one for local and one for long distance or toll lines, or that it acquired any right whatsoever to maintain and operate a local telephone exchange or system within said City under said Ordinance No. 180, for the following reasons:

(a). The sole right and authority of plaintiff to maintain and operate a local telephone exchange or line within the said defendant City was acquired by and through Ordinance No. 135, of said City, "Granting to F. B. Elce, his Associates, Heirs and Assigns the use of the Streets, Alleys and Public Grounds of the City of Mitchell, S. D., for the Erection and Maintenance of a Public Telephone System." Passed by the City Council May 11th, 1898; that the franchise and all rights granted by said Ordinance expired by the terms thereof May 11th, 1913.

(b). That said Ordinance No. 180 did not grant to the Dakota Central Telephone Lines (Inc.) under which plaintiff claims, does not and never did authorize the Dakota Central Telephone Lines (Inc.), its successors or assigns, the right to maintain and operate a local telephone exchange within said City.

(c). The plaintiff herein was and is precluded and estopped from maintaining this suit, because of the adjudication by the Supreme Court of the State of South Dakota, in the case of 252 City of Mitchell, et al., vs. Dakota Central Telephone Company, decided May 24th, 1910; 25 S. D. 409, (127 N. W. 582) wherein said Court considered said Ordinance and decided that said Ordinance No. 180 did not repeal Ordinance No. 135, and that said Ordinance No. 135 was for a local telephone system within the defendant City, and that said Ordinance No. 180 only authorized a long distance telephone system within and through said City, and that said construction and decision by said State Court is res adjudicata and conclusive of this question against plaintiff, and it cannot be heard upon the same question in this suit. Said Ordinance No. 180 is as follows:

"An ordinance to grant permission to the Dakota Central Telephone Lines, (Inc.), their successors or assigns, the right to erect poles and fixtures, and to string wires, for the purpose of operating a long distance telephone system, within and through the city of Mitchell, South Dakota.

Be it ordained by the city council of the city of Mitchell, South Dakota.

Section 1. That there is hereby granted the right and privilege, given to the Dakota Central Lines, (Inc.) their successors or assigns to erect poles, and string wires on any of the streets, alleys and public highways of the city of Mitchell, excepting Main, Park Avenue, Fourth and Fifth Streets, this exception however, not to prohibit the crossing of Main, Park Avenue, Fourth and Fifth Streets, at right angles, where it is necessary, and maintaining the same for a period of twenty years, from and after the passage and approval of this ordinance, for supplying the citizens of the

253 City of Mitchell, and the public in general, facilities to communicate with parties residing in, near or at a distance from Mitchell, and all such rights to be continued on the conditions herein named.

Section 2. The poles and wires are to be located under the direction of a committee, appointed by the city council.

Section 3. All poles, wires and fixtures are to be placed so as not to interfere with the ordinary travel and traffic on the streets, alleys and public highways or shade or ornamental trees in said city of Mitchell; and are not to interfere with the flow of water in any main, sewer, or gutter in said city of Mitchell; and the City of Mitchell may adopt any reasonable rules and regulations of a police nature, as may be deemed necessary, not destructive, however, to the rights and privileges herein granted.

Section 4. The rights and privileges herein granted are not exclusive, and the said City of Mitchell, reserves the right to grant the same rights and privileges to other parties, the same, however, not to interfere with the rights and privileges herein granted.

Section 5. In consideration of the above, the City of Mitchell shall have the right to string wires on the poles of the Dakota Central Telephone Lines for fire alarm purposes, said work to be superintended by the above company and such wires are not to interfere with the workings of the wires of the Dakota Central Telephone Lines.

Section 6. This ordinance shall be in effect from and after the date of its passage and approval.

Passed June 6th, 1904.

Approved June 7th, 1904.

GEO. A. SILSBY, *Mayor.*

J. G. MARKHAM, *Auditor."*

254 (d). It affirmatively appears from the record and is undisputed that notwithstanding said ordinance No. 180, plaintiff continued to operate and maintain its local telephone exchange within the defendant city from the date of the passage of said Ordinance No. 180, to-wit: June 7th, 1904, under the authority of said Ordinance No. 135 and paid the gross earnings tax imposed thereby, and otherwise complied therewith until the expiration of all of the rights granted thereby, to-wit: May 11th, 1913, and the plaintiff thereby placed a practical construction upon said ordinance, as well as Ordinance No. 180, to the effect that said Ordinance No. 135 granted the right to own and maintain only a local telephone exchange within the defendant City, and that said Ordinance No. 180 granted authority only to maintain and operate a long distance telephone exchange; that the interpretation of said Ordinances so adopted by plaintiff was determined by the Supreme Court of South Dakota, in the case of City of Mitchell vs. Dakota Central Telephone Company, supra, and that the rights of plaintiff under said Ordinance, and particularly No. 180 were found and conclusively determined in said action, and the same became res adjudicata of said question, and plaintiff is bound thereby and estopped from urging



the same question in this action, and Federal Courts are bound by the interpretation of said Ordinance adopted by said State Supreme Court.

255 (e) That plaintiff is precluded and estopped by the decision of said Supreme Court in the case of City of Mitchell vs. Dakota Central Telephone Company, supra from urging in this Court the repeal of said Ordinance No. 135, by the Resolution adopted by the defendant City April 10th, 1907, because:

1. Said resolution did not in effect repeal, or pretend to repeal said Ordinance No. 135, but simply granted plaintiff permission to place its wires underground when and where conditions required.

2. Said Resolution was not of equal dignity with said Ordinance No. 135 and could not operate as a repeal of said Ordinance.

3. The State Supreme Court in the case above cited, decided that said Resolution did not operate as a repeal of said Ordinance No. 135 and that decision was and is res adjudicata as against plaintiff, and plaintiff is estopped from raising that question in this action; that the decision of said Supreme Court should be respected and followed by federal Courts.

Said Resolution of April 10th, 1907 is as follows:

"Be it resolved by the City Council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, their successors and assigns, to place, construct and maintain, through and under the streets, alleys and public grounds of said city such conduits, manholes, and cables proper and necessary for supplying to the citizens of said city and public in general, communication by telephone and other improved appliances."

256

### Third.

That said District Court erred in adjudging and entering its decree that said resolution of March 17th, 1913 was and is unconstitutional and void, and impairs the obligations of a contract between the parties thereto, contained in said Ordinance No. 180, in violation of Section 10, Article 1 of the Constitution of the United States, and that it deprives plaintiff of property without due process of law, in violation of Section 1, of the Fourteenth Amendment of the Constitution of the United States, for all of the reasons stated in assignments numbered First and Second herein.

### Fourth.

That said District Court erred in enjoining and restraining the defendant City, its officers, agents, attorneys and servants from interfering with the poles, telephone lines and telephone exchange now owned and operated by plaintiff in the defendant City, because such injunction unjustly interferes with the exercise of the police powers of the defendant City, and unjustly deprives it of the right to impose reasonable conditions and burdens upon the plaintiff's right to operate and maintain any local telephone exchange within said city.



## Fifth.

The Court erred in admitting the testimony given by M. L. Lane, as hereinafter set out, over defendant's objection that such evidence was incompetent, irrelevant and immaterial in that it is an attempt to construe the meaning of the ordinances involved in this action by oral extrinsic evidence and that the meaning, scope and effect of such ordinance cannot be proved by such evidence. The evidence objected to as above, is as follows:

257 "When I first engaged in the telephone business the 'Blake Transmitter' was in use, the transmitter is that portion of the telephone which the user speaks into when using the telephone. The Blake transmitter consisted of a carbon button, a platinum point and a diaphragm and was found to be an efficient transmitter for transmitting messages a short distance, that is 20, 25 or 30 miles. This instrument was in general use in local exchanges from 1889 to about 1904 or 1905. The type of transmitter now in use is what is known as the 'long distance' transmitter or 'solid back.' This transmitter was put on the market in 1893 at which time it began to be substituted for the Blake transmitter, but this substitution did not become general until about 1896, 1897 or 1898 in the entire United States and in some localities it was in general use before that date. The solid back transmitter was first used for long distance business and as soon as its increased efficiency became generally known it was substituted for the old transmitters as rapidly as the manufacturers could produce them, both in local and long distance work. This change was made between 1896 and 1904 or 1905. At first higher rate was paid for the use of the 'solid back' transmitter than for the old type."

258

## Sixth.

The Court erred in overruling the defendant's objection to the following question asked of M. L. Lane, to-wit:

"Q. With the Blake transmitter what was the custom, what was the custom with reference to the subscriber in using the toll lines with reference to the telephone from which he would talk."

This was objected to as incompetent, irrelevant and immaterial, for the reason it don't tend to prove any of the issues in this case, for the further reason that no proper foundation has been laid, and it don't appear that the defendant is in any way bound by this custom; and for the further reason that it seeks to interpret the ordinance in question, in this litigation, by oral and extrinsic evidence outside of the ordinances themselves. Objection overruled. Exception allowed.

"A. Both the representatives of the company and the subscribers, from actual experience, knew that it was impossible to carry on a satisfactory conversation for a considerable distance with this transmitter. And after installation of the solid back transmitter, the subscriber, in preference to attempting to talk through this transmitter, would come to the central office, or to such point as the

company had located one of its long distance transmitters, and use the long distance transmitter or solid back in the place of the Blake for a long distance conversation.'

Seventh.

The Court erred in overruling defendant's objection to the following question asked of the witness M. L. Lane, to-wit:

"Q. Now, this solid back transmitter you have spoken of, what was the trade name by which such instrument was generally known among the telephone people?"

259 Mr. Miller: Objected to as incompetent, irrelevant and immaterial and not tending to prove any of the issues in this case and no proper foundation has been laid for it and for the further reason it don't appear that the trade name of this instrument was taken into consideration at the time of the passage of the ordinance in litigation; and for the further reason it is in no way binding on this defendant, and that it is a mere attempt to prove the meaning, scope and effect of the ordinances of the City of Mitchell involved in this litigation, by oral and extrinsic evidence outside of the said ordinances themselves, and that this is not the proper method of proving such meaning, scope and effect. Objection overruled. Exception allowed.

"A. Long distance transmitter."

Eight.

The Court erred in overruling the defendant's objection and in admitting the testimony hereinafter stated as given by Charles E. Hall over the defendant's objection that it was incompetent, irrelevant and immaterial, and for the further reason that no proper foundation has been laid and that it is not binding on the defendant; and for the further reason it is an attempt to prove the scope, meaning and effect of the ordinances involved in this litigation by oral and extrinsic evidence outside of the ordinances themselves and this is an improper method of proving such meaning, scope and effect of such ordinances. Objection overruled. Exception allowed. The evidence objected to was as follows:

260 "The early telephone instruments were equipped with magneto calls, transmitters, receivers and batteries. The Blake transmitter was in use in 1884, until June 1905, more or less; their use gradually diminished along toward 1905, when none or very few were used. The capacity as to distance of the Blake transmitter depended upon the condition and character of the line, perhaps it was not over 50 or 75 miles over good iron lines. Long distance lines were generally constructed after 1894, and copper wire came into use in 1889, which carry messages longer distances than the iron wire. The 'solid back' transmitter did not come into extended use until about 1901 or 1902. They were first introduced in toll line business in 1893 and 1894. Prior to the time when the

solid back came into general use, the subscriber had difficulty in talking up to 100 or more miles and he would generally go to the central office or long distance to talk, but after the solid back transmitter had been furnished, the subscriber was generally able to talk over long distance from his office.

The subscribers of the Iowa Telephone Company prior to 1904, were supplied with the 'solid back' or long distance transmitters as rapidly as the transmitters could be secured, and the rental charges for these were generally greater than for the Blake transmitters. During the time from 1893 to 1904 the 'solid back transmitter' went under the trade name of 'long distance telephone.'

261

## Ninth.

The Court erred in overruling defendant's objection to, and in admitting the testimony hereinafter set out as given by J. L. W. Zeitlow over defendant's objection that such evidence was incompetent, irrelevant and immaterial; that it does not tend to prove any of the issues in this case, and that it is in no way binding upon the defendant; that no proper foundation has been laid, and further reason that it is an attempt by oral and extrinsic testimony to prove the meaning, scope and effect of such ordinance, and that the language of ordinances themselves is the only evidence of such meaning, scope and effect, and for the further reason that the meaning, scope and effect of such ordinance has been heretofore determined by the Supreme Court of the State of South Dakota. Objection overruled. Exception allowed.

The evidence objected to is as follows:

"The Blake transmitters were in common use from 1883 to 1905 and 1906. That is, they were used principally in the earlier period and gradually disappeared in the latter. They were used principally in telephone exchanges in short lines. The solid back transmitter was patented in 1892 by Anthony C. White. They were first used for long distance purposes and were gradually put in service in local exchanges, the first I knew of it from 1890 to 1896, and from that time on they were substituted as far as they could be had. Prior to the time they came into general use, they were sometimes supplied specially to subscribers who wanted special or better service over long distances. These solid back instruments were known by the trade name of 'long distance telephone instruments.'

262 A successful conversation could be heard through the

Blake transmitter from a distance of 25 to 100 miles according to the other conditions of the line and construction; with a solid back, you could talk over a thousand miles. My company began to install the solid back transmitter for general use in local exchanges from 1898 to 1906. I mean by that, that we after that time did not use any other transmitter. I was president of the Dakota Central Telephone Lines Company in 1904."

## Tenth.

The Court erred in overruling defendant's objection to the following question propounded to J. L. W. Zeitlow:

"Q. How are they classed with reference to long distance telephones or otherwise?"

Mr. Miller: That is objected to as incompetent, irrelevant, and immaterial, calling for a conclusion of the witness; that it don't tend to prove any of the issues in this case, and is in no way binding upon the defendant, and that it seeks to prove the meaning, scope and effect of ordinances No. 174 and 180 of the City of Mitchell, involved in this litigation, by oral and extrinsic evidence outside of the ordinances themselves, and that it is not the proper method of proving the meaning, scope and effect of such ordinances, and that the language of the ordinances themselves is the only evidence admissible in such case; and for the further reason that the Supreme Court of the State of South Dakota, has construed the meaning, scope and effect of such ordinances contrary to the contention of plaintiff in this action. Objection overruled. Exception allowed.

263 A. They are long distance transmitters and telephones. There are approximately between eleven and twelve hundred subscribers to the local exchange in Mitchell and about one-fourth of them are business telephones. The subscriber secures connections with the toll lines by inserting the finger in the place called 'long distance' and rotating the dial to the stop and then letting the dial work back, and then the long distance operator puts the subscriber in connection with his party."

## Eleventh.

The Court erred in overruling defendant's objection to the following question propounded to the witness, John Osteline, to-wit:

"Q. While you were in Minneapolis, were there any Blake transmitters in use at that time?"

Mr. Miller: This is objected to as incompetent, irrelevant and immaterial; that it don't tend to prove any of the issues in this case and is in no way binding upon the defendant, and that it seeks to prove the meaning, scope and effect of ordinances No. 174 and 180 of the City of Mitchell, involved in this litigation, by oral and extrinsic evidence outside of the ordinances themselves, and that it is not the proper method of proving the meaning, scope and effect of such ordinances, and that the language of the ordinances themselves is the only evidence admissible in such case; and for the further reason that the Supreme Court of the State of South Dakota, has construed the meaning, scope and effect of such ordinances contrary to the contention of the plaintiff in this case. Objection overruled. Exception allowed.

264 "A. No, sir, there was not; not to my knowledge, there was not."

The witness further testified over the same objection as above, that the transmitter in use at that time was called the solid back long distance transmitter and that in the early days the instrument was designated as the "Blake Transmitter" and "Long distance transmitter" and many called it the "solid back."

#### Twelfth.

The Court erred in sustaining the complainant's objection to the following question propounded to witness, George E. Foster, for the defendant:

"Q. What do you understand by long distance telephone?"

Objected to as immaterial and incompetent. Objection sustained. Exception allowed.

"A. My understanding of a long distance telephone was to connect different towns in different parts of the state, so as to talk with people outside of Mitchell."

#### Thirteenth.

The Court erred in sustaining the complainant's objection to the following question propounded to George E. Foster, witness for the defendant:

"Q. That is what you understood by the term 'long distance' telephone at the time of the passage of this ordinance?"

Objected to as incompetent and immaterial and could not be received to interpret the ordinance. Objection sustained. Exception allowed.

"A. That is what I understood."

265

#### Fourteenth.

The Court erred in sustaining the complainant's objection to the following question propounded to A. J. Kings, witness for the defendant:

"Q. You may state what your understanding is of the term 'long distance'?"

Objected to as immaterial and incompetent. Objection sustained. Exception allowed.

"A. I understand it is a line running from different towns and connecting the different towns in the country."

#### Fifteenth.

The Court erred in sustaining complainant's objection to the following question propounded to A. J. Kings, as witness for the defendant:

"Q. Did you so understand the term 'long distance telephone' at the time this ordinance was passed?"

Objected to as immaterial and incompetent. Objection sustained. Exception allowed.

"A. Yes, as connecting different towns around."

Sixteenth.

The Court erred in sustaining the complainant's objection to the following question asked of defendant's witness, A. J. Kings, to-wit:

"Q. You may state whether or not at the time this ordinance No. 180 was passed, you intended as a member of the City Council to grant a franchise to the Dakota Central Telephone Lines for the purpose of constructing and operating a local exchange in the City of Mitchell, South Dakota?"

266      Objected to as incompetent and immaterial for the purpose of interpreting the ordinance. Objection sustained. Exception allowed.

"A. I did not understand it as a local exchange. We already had one."

Seventeenth.

The Court erred in sustaining complainant's objection to the following question propounded to the witness, J. E. Wells for the defendant:

"Q. State what you understand by the term 'Long distance'?"

Objected to as incompetent and immaterial and no foundation laid for it. Objection sustained. Exception allowed.

"A. It is a telephone connection from one town to another."

Eighteenth.

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, J. E. Wells, for the defendant:

"Q. That was your understanding of that term 'long distance telephone' at the time these ordinances were passed was it?"

Objected to as immaterial and incompetent. Objection sustained. Exception allowed.

"A. That is the way I remember it."

267

Nineteenth.

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, J. E. Wells, for the defendant:

"Q. As far as you remember, Mr. Wells, did you intend at the

time you voted for these ordinances to grant to the Dakota Central Telephone Lines a franchise for the purpose of owning and operating a local telephone system or exchange in the City of Mitchell?"

Objected to as immaterial and incompetent and cannot be received for inferring the interpretation of ordinances. Objection sustained. Exception allowed.

"A. It wasn't my idea at the time."

Twentieth.

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, J. E. Wells, for the defendant:

"Q. Your understanding was that they were simply getting a long distance franchise to connect the city with places outside the city by telephone?"

Objected to as incompetent, immaterial and cannot be received for the purpose of inferring the interpretation of the ordinance. Objection sustained. Exception allowed.

"A. Yes, sir."

Twenty-first.

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, A. J. Curtis, for the defendant:

"Q. What do you understand by the term 'long distance telephone'?"

268 Objected to as immaterial and incompetent and no proper foundation laid for it. Objection sustained. Exception allowed.

"A. Long distance would be to telephone to places outside of the city—to other towns."

Twenty-second.

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, A. J. Curtis, for the defendant:

"Q. Was that the understanding you had of the term 'long distance' at the time these ordinances were passed?"

Objected to as immaterial and incompetent for the purpose of interpreting the ordinance. Objection sustained. Exception allowed.

"A. Yes sir, that was my understanding at that time, that it was for long distances to connect with other towns and people at a long distance."



## Twenty-third.

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, A. J. Curtis, for the defendant:

"Q. Did you intend as a member of the City Council in voting for the passage of Ordinance No. 180 to grant to the Dakota Central Telephone Company the right and privilege of owning and operating a local telephone system or exchange within the City of Mitchell, South Dakota?"

269        Objected to as immaterial and incompetent and inadmissible for the purpose of interpreting the ordinance. Objection sustained. Exception allowed.

"A. I didn't vote with the understanding that they were to have any local telephone. It was long distance. What the ordinance called for was long distance and communication outside of the city."

## Twenty-fourth.

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, George A. Silsby, for the defendant:

"Q. Mr. Silsby, what do you understand by the term 'long distance telephone'?"

Objected to as immaterial and incompetent and no proper foundation laid for it. Objection sustained. Exception allowed.

"A. The facilities for connecting between points or between different towns and cities."

## Twenty-fifth.

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, George A. Silsby, for the defendant:

"Q. Did you understand that if I phoned from the office up to your office at the Elks that that would be a long distance telephone or do you mean to say the points should be in different localities or towns?"

270        Objected to as immaterial and no proper foundation has been laid for it. Objection sustained. Exception allowed.

"A. Generally speaking, I should understand it as between different towns."

## Twenty-sixth.

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, George A. Silsby, for the defendant:

"Q. Was that the understanding you had of 'long distance telephones' at the time you signed these two ordinances I have heretofore mentioned?"

Objected to as incompetent and immaterial, and no proper foundation laid for it. Objection sustained. Exception allowed.

"A. I think it was. That was my understanding at that time."

Twenty-seventh.

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, George A. Silsby, for the defendant:

"Q. Then as far as you know that was the understanding of the other members of the council, was it not?"

Objected to as immaterial and incompetent and no proper foundation laid for it. Objection sustained. Exception allowed.

"A. I think that that was the sense of the council."

271

Twenty-eighth.

The Court erred in sustaining the complainant's objection to the following question propounded to the witness, George A. Silsby, for the defendant:

"Q. In the passing of these ordinances the City Council at the time as you understood it, did not intend to grant a franchise to the Dakota Central Telephone Lines to own and operate a local telephone or exchange in the City?"

Objected to as immaterial and incompetent and cannot be received for the varying of the interpretation of the ordinances.

"A. No, sir."

Wherefore, the Appellant prays that said decree be reversed and that said District Court for the District of South Dakota be ordered to enter a decree reversing the decision of the lower Court in said cause.

LAURITZ MILLER,  
EDWARD E. WAGNER,  
*Attorneys for Appellant.*

(Endorsed:) #5 S. D. Equity—District Court United States, District of South Dakota, Southern Division—Dakota Central Telephone Company, a corporation, Plaintiff, vs. The City of Mitchell, a municipal corporation, Defendant—Due and personal service of the within Assignment of Errors upon me at Huron, South Dakota, is admitted this 15 day of April, A. D. 1916. Null & Royhl, Attorneys for Plaintiff—Gamble, Wagner & Danforth, Lauritz Miller, Attorneys for Defendant, Sioux Falls, South Dakota—Filed April 4, 1916, Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

272 And, to-wit, on the same day, there was filed in the office of the clerk of said court, Petition for Appeal to the Supreme Court of the United States; which said Petition is in words and figures the following, to-wit:

273 In the District Court of the United States, District of South Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation,  
Complainant,

vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

*Petition for Appeal to the Supreme Court of United States.*

To the Honorable Wilbur F. Booth, District Judge:

The above named defendant, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 14th day of September, A. D. 1915, does hereby appeal from said decree to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and document upon which said decree was based, duly authenticated be sent to the Supreme Court of the United States, sitting at the City of Washington, in the District of Columbia, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

Dated this 31st day of March, A. D. 1916.

LAURITZ MILLER,  
EDWARD E. WAGNER,  
*Attorneys for Defendant.*

(Endorsed:) #5 S. D. Equity—United States District Court, District of South Dakota, Southern Division—Dakota Central Telephone Company, a corporation, Plaintiff, vs. The City of Mitchell, a municipal corporation, Defendant—Due and personal service of the within Petition for Appeal to the Supreme Court of the United States upon me at Huron, South Dakota, is admitted this 15 day of April, A. D. 1916. Null & Royhl, Attorney for Plaintiff—Gamble, Wagner & Danforth, Lauritz Miller, Attorneys for Defendant, Sioux Falls, South Dakota—Filed April 4, 1916, Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

And afterwards, to-wit, on the 15th day of April, A. D. 1916, there was filed in the office of the clerk of said court, Order allowing Appeal; which said Order is in words and figures the following, to-wit:

275 In the District Court of the United States, District of South Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation,  
Plaintiff,

vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

*Order Allowing Appeal.*

On motion of Lauritz Miller, and Edward E. Wagner, Solicitors and Counsel for Defendant, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of Two thousand dollars (\$2,000.00), the same to act as a bond for costs and damages on appeal.

Dated this 15th day of April, A. D. 1916.

By the Court:

WILBUR F. BOOTH,  
*United States District Judge.*

Attest:

OLIVER S. PENDAR, *Clerk,*  
By C. C. SCHWARZ, *Deputy.*

[Seal of Court.]

276 (Endorsed:) #5 S. D. Equity—United States District Court, District of South Dakota, Southern Division—Dakota Central Telephone Company, a corporation, Plaintiff, vs. The City of Mitchell, a municipal corporation, Defendant—Due and personal service of the within Order Allowing Appeal upon me at Huron, South Dakota; is admitted this 15 day of April, A. D. 1916. Null & Royhl, Attorney- for Plaintiff—Gamble, Wagner & Danforth, Lauritz Miller, Attorneys for Defendant, Sioux Falls, South Dakota—Filed April 15, 1916, Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

And, to-wit, on the same day, there was filed in the office of the clerk of said court, Bond on Appeal; which said Bond is in words and figures the following, to-wit:

277 In the District Court of The United States, District of South Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation, Complainant,

vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

*Bond on Appeal.*

Know All Men By These Presents: That we, The City of Mitchell, a municipal corporation, as principal and S. H. Scallin and E. W. Heyler, as sureties, of the County of Davison, State of South Dakota, are held and firmly bound unto Complainant, in the sum of Two thousand dollars (\$2000.00), lawful money of the United States, to be paid to complainant, its successors or assigns; to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators, by these presents.

Sealed with our seals and dated this 3rd day of April, A. D., 1916.

Whereas, the above bounden defendant has prosecuted an appeal to the Supreme Court of the United States to reverse the decree of the District Court for the District of South Dakota, in the above entitled cause.

Now Therefore, the condition of this obligation is such that if the above named defendant shall prosecute its said appeal to effect and answer all costs if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

THE CITY OF MITCHELL, SOUTH DAKOTA,

By A. E. HITCHCOCK, *Mayor.*

S. H. SCALLIN.

E. W. HEYLER.

Attest:

[SEAL.] THOMAS EASTCOTT,  
*City Auditor.*

STATE OF SOUTH DAKOTA,

*County of Davison, ss:*

On the 3d day of April, A. D., 1916, personally appeared before me, S. H. Scallin and E. W. Heyler respectively known to me to be the persons described in and — duly executed the foregoing instrument as parties thereto, and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purposes therein set forth.

And the said S. H. Scallin and E. W. Heyler being respectively by me duly sworn, says, each for himself and not one for the other, that he is a resident and householder of the said county of Davison and that he is worth the sum of Two thousand dollars (\$2000.00)

over and above his just debts and legal liability and property exempt from execution.

S. H. SCALLIN.  
E. W. HEYLER.

Subscribed and sworn to before me this 3d day of April, 1916.  
[NOTARIAL SEAL.]  
E. K. LOOMER,  
*Notary Public, South Dakota.*

279 The within bond is approved as to sufficiency and form this 15th day of April, A. D., 1916.  
WILBUR F. BOOTH,  
*United States District Judge.*

This is to certify that the undersigned has personally known the above named sureties for a number of years and is thoroughly familiar with their financial responsibility and that he unqualifiedly recommends them as sufficient sureties on the above bond.

LAURITZ MILLER,  
*Att'y for City of Mitchell.*  
EDWARD E. WAGNER,  
*Attorney for Defendant.*

(Endorsed:) # 5 S. D. Equity—District Court of United States, District of South Dakota, Southern Division—Dakota Central Telephone Company, a corporation, Plaintiff, vs. The City of Mitchell, a municipal corporation, Defendants—Due and personal service of the within Bond on Appeal upon me at Huron, South Dakota, is admitted this 15 day of April, A. D. 1916. Null & Royhl, Attorneys for Plaintiff—Gamble, Wagner, & Danforth, Lauritz Miller, Attorneys for Defendant, Sioux Falls, South Dakota—Filed April 15th, 1916, Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

And afterwards, to-wit, on the 11th day of May, A. D. 1916, there was filed in the office of the clerk of said court, *Præcipe* for Record on Appeal; which said *Præcipe* is in words and figures the following to-wit:

280 In the District Court of the United States, District of South Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, Plaintiff,  
vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

*Præcipe.*

To Oliver S. Pendar, Clerk of said Court:

Please incorporate in the transcript of the record on the appeal of said case to the Supreme Court of the United States, in accordance

with the appeal allowed on the 15th day of April, 1916, the following papers:

Bill of Complaint.

Process of Subpoena and return of Marshall thereon.

Answer of the Defendant, (Except Exhibits A, B, C, D, thereto attached which appear in agreed statement or "stipulation").

Decree of the Court.

Opinion of the Court.

Petition for Appeal.

Order allowing Appeal.

Assignment of Errors.

Bond on Appeal.

Citation, and Clerk's Certificate thereon.

Order extending time to allow settling Statement of Evidence.

Statement of Evidence, and Certificate of Judge allowing the same.

LAURITZ MILLER,

EDWARD E. WAGNER,

*Attorneys for Appellant.*

281 (Endorsed:) United States District Court, District of South Dakota, Southern Division—Dokato Central Telephone Company, Plaintiff, vs. The City of Mitchell, Defendant—Due and personal service of the within Præcipe upon us at Huron, South Dakota, is admitted this 9th day of May, A. D. 1916. Null & Royhl, Attorneys for Plaintiff—Gamble, Wagner & Danforth, Attorneys for Defendant, Sioux Falls, South Dakota. Filed May 11th, A. D., 1916, Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

282 UNITED STATES OF AMERICA,

*Southern Division, District of South Dakota, ss:*

I, Oliver S. Pendar, Clerk of the District Court of the United States, in and for the the District of South Dokato, do hereby certify and return to the Honorable, the Supreme Court of the United States, that the foregoing, consisting of 281 pages, numbered consecutively from 1 to 281 inclusive, is a true and complete transcript of all of the record, process, pleadings, orders and final decree, as enumerated in the written præcipe of the party appellant to this cause filed herein, directing the Clerk what parts of the record and papers to be included within such transcript, as fully as the same appears from the original records and files of said Court, and I do further certify and return that I have annexed to said transcript, and included within said paging, the original Citation, together with the admission of service thereon, and in addition thereto a copy of said præcipe, and all written opinions of the Court filed in said cause.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, in the said District, this 10 day of June, A. D. 1916.

[United States internal revenue documentary Stamp, series of 1914, 10 cents, canceled C. C. S.]

OLIVER S. PENDAR, *Clerk,*  
By C. C. SCHWARTZ, *Deputy.*



283 In the District Court of the United States, District of South Dakota, Southern Division.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation, Complainant,

vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant.

*Order.*

It appearing to the Court that the Appellant and defendant can not without very great inconvenience to the parties, docket said case and file the record thereof with the Clerk of the Supreme Court of the United States on or before the return day named in the citation, issued herein on the 15th day of April A. D., 1916, and that the Clerk of the District Court will not be able to prepare the record thereof within time to enable the Appellant to docket the case and file the record thereof with the Clerk of the Supreme Court, by or before the return day fixed in said citation, and both of the parties hereto, having stipulated in writing for the enlargement of the time, it is hereby ordered that Appellant's time within which to docket said case and file the record thereof with the Clerk of the Supreme Court, be, and the same is hereby enlarged and extended for an including a period of sixty days from and after the return day fixed in said citation, that is to say: that Appellant's time within which to docket said case and file the record thereof with the Clerk of the Supreme Court is hereby enlarged and extended to and including the 15th day of August, A. D., 1916.

WILBUR J. BOOTH,

*Judge of the United States District Court, Sitting by Special Assignment in Lieu of Hon. James D. Elliott, Judge of said District, Disqualified.*

Attest:

— — —, *Clerk.*

284 [Endorsed:] United States District Court, District of South Dakota, Southern Division. Dakota Central Telephone Company, a corporation, Plaintiff, vs. The City of Mitchell, Defendant. Due and personal service of the within order enlarging time to file record in Supreme Court upon us at Huron, South Dakota, is admitted this 9th day of May, A. D. 1916. Null & Royal, Attorney- for Plaintiffs. Gamble, Wagner & Danforth, Attorneys for Defendant, Sioux Falls, South Dakota.

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In the Supreme Court of the United States.

No. 531.

DAKOTA CENTRAL TELEPHONE COMPANY, a Corporation, Complain-  
ant and Appellee,

vs.

THE CITY OF MITCHELL, a Municipal Corporation, Defendant and  
Appellant.

*Statement of Points and Designation for Printed Record by  
Appellant.*

To the clerk of said court:

The following are the points on which Appellant intends to rely  
on this appeal.

Statement of Points.

First.

That the United States District Court for the District of South  
Dakota erred in taking and entertaining jurisdiction of this suit;  
that said Court did not have jurisdiction to hear and determine the  
same for the following reasons:

(a) Because the Resolution of the defendant City of March 17th,  
1913, the enforcement of which plaintiff seeks by this suit to enjoin,  
is not a law and did not, and does not have the force of effect of a  
law of a state, impairing the obligations of a contract, within the  
meaning of Section 10, Article 1 of the Constitution of the United  
States.

(b) The Supreme Court of the State of South Dakota has con-  
sidered and decided that a resolution of a city council in said state,  
is not of equal dignity with and does not operate as a repeal  
286 of, an ordinance enacted by a city council, and such decision  
is conclusive of this question and binding upon the Federal  
Courts. (Assignment of Error No. 1.)

Second.

The District Court erred in adjudging and entering its decree  
that plaintiff is and since June 7th, 1904, has been rightfully and  
lawfully maintaining and operating under the rights and privileges  
granted to the Dakota Central Telephone Lines (Inc.) by Ordinance  
No. 180 of the defendant, City, two separate and distinct tele-  
phone exchanges or systems, one for local and one long distance or  
toll lines, or that it acquired any right whatsoever to maintain and  
operate a local telephone exchange or system within said City under  
said Ordinance No. 180, for the following reasons:

(a). The sole right and authority of plaintiff to maintain and

operate a local telephone exchange or line within the said defendant City was acquired by and through Ordinance No. 135 of said City, "Granting to F. B. Elce, his Associates, Heirs and Assigns the Use of the Streets, Alleys and Public Grounds of the City of Mitchell, S. D., for the Erection and Maintenance of a Public Telephone System." Passed by the City Council May 11th, 1898; that the franchise and all rights granted by said Ordinance expired by the terms thereof May 11th, 1913.

(b). That said Ordinance No. 180 did not grant to the Dakota Central Telephone Lines (Inc.) under which plaintiff claims, does not and never did authorize the Dakota Central Telephone Lines (Inc.) its successors or assigns, to maintain and operate a local telephone exchange within said City.

(c). The plaintiff herein was and is precluded and estopped from maintaining this suit, because of the adjudication by the Supreme Court of the State of South Dakota, in the case of City of Mitchell, et al., vs. Dakota Central Telephone Company, decided May 24th, 1910, 25 S. D. 409; (127 N. W. 562) wherein said Court  
287 considered said Ordinance and decided that said Ordinance No. 180 did not repeal Ordinance No. 135, and that said Ordinance No. 135 was for a local telephone system within the defendant City, and that said Ordinance No. 180 only authorized a long distance telephone system within and through said City, and that said construction and decision by said State Court *in res adjudicata* and conclusive of this question against plaintiff, and it cannot be heard upon the same question in this suit.

(d). It affirmative- appears from the record and is undisputed that notwithstanding said Ordinance No. 180, plaintiff continued to operate and maintain its local telephone exchange within the defendant city from the date of the passage of said Ordinance No. 180, to-wit: June 7th, 1904, under the authority of said Ordinance No. 135 and paid the gross earnings tax imposed thereby, and otherwise complied therewith until the expiration of all of the rights granted thereby, to-wit: May 11th, 1913, and the plaintiff thereby placed a practical construction upon said ordinance, as well as Ordinance No. 180, to the effect that said Ordinance No. 135 granted the right to own and maintain only a local telephone exchange within the defendant City, and that said Ordinance No. 180 granted authority only to maintain and operate a long distance telephone exchange; that the interpretation of said Ordinance so adopted by plaintiff was determined by the Supreme Court of South Dakota, in the case of City of Mitchell vs. Dakota Central Telephone Company, *supra*, and that the rights of plaintiff under said Ordinance, and particularly No. 180, were found and conclusively determined in said action, and the same became *res adjudicata* of said question, and plaintiff is bound thereby and estopped from urging the same question in this action, and Federal Courts are bound by the interpretation of said Ordinance adopted by said State Supreme Court.

(e). That plaintiff is precluded and estopped by the decision of

288 said Supreme Court in the case of City of Mitchell vs. Dakota Central Telephone Company, supra, from urging in this Court the repeal of said Ordinance No. 135 by the Resolution adopted by the defendant City, April 10th, 1907, because:

1. Said Resolution did not in effect repeal, or pretend to repeal, said Ordinance No. 135 but simply granted plaintiff permission to place its wires underground when and where conditions required.

2. Said Resolution was not of equal dignity with said Ordinance No. 135 and could not operate as a repeal of said Ordinance.

3. The State Supreme Court in the case above cited, decided that said Resolution did not operate as a repeal of said Ordinance No. 135, and that decision was and is res adjudicata as against plaintiff, and plaintiff is estopped from raising that question in this action; that the decision of said Supreme Court should be respected and followed by Federal Courts. (Assignment No. 2.)

### Third.

That said District Court erred in adjudging and entering its decree that said Resolution of March 17th, 1913 was and is unconstitutional and void and impairs the obligations of a contract between the parties thereto, contained in said Ordinance No. 180, in violation of Section 10, Article 1 of the Constitution of the United States, and that it deprives plaintiff of property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, for all of the reasons stated in Assignments numbered First and Second herein.

### Fourth.

That said District Court erred in enjoining and restraining the defendant City, its officers, agents, attorneys and servants from interfering with the poles, telephone lines and telephone exchanges now owned and operated by plaintiff in the defendant City, because such injunction unjustly interferes with the exercise of the police power of the defendant City, and unjustly deprives it of the right to  
289 impose reasonable conditions and burdens upon the plaintiff's right to operate and maintain any local telephone exchange within said City. (Assignment No. 4.)

### Fifth.

The Court erred in admitting the testimony of N. L. Lane and other witnesses concerning the history and uses of the various kinds of telephone transmitters and devices as set forth in the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Assignment of Errors.

### Sixth.

That the Court erred in sustaining objections to the testimony of George E. Foster and other witnesses offered on behalf of the de-

fendant as to the meaning and general understanding of the term "long distance telephone," as set forth in the Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-first, Twenty-second, Twenty-third, Twenty-fourth, Twenty-fifth, Twenty-sixth, Twenty-seventh and Twenty-eighth Assignment of Errors.

Appellant deems the entire record necessary for the consideration of the foregoing points, and respectfully requests that the same be printed.

LAURITZ MILLER,  
EDWARD E. WAGNER,  
*Attorneys for Appellant.*

290 [Endorsed:] 531—16/25361. In the Supreme Court of the United States. Dakota Central Telephone Company, a corporation, plaintiff, vs. The City of Mitchell, a municipal corporation, Defendant. Due and personal service of the within statement of points and designation for printed record *at* appellant upon us at Huron, South Dakota; is admitted this 30th day of June, A. D. 1916. T. H. Null, Attorneys for Appellee. Gamble, Wagner & Danforth, Attorneys for Appellant, Sioux Falls, South Dakota.

291 [Endorsed:] File No. 25361. Supreme Court U. S., October term, 1916. Term No. 531. The City of Mitchell, Appellant, vs. Dakota Central Telephone Co. Statement of points to be relied upon and designation by appellant of entire record to be printed. Filed July 6, 1916.

Endorsed on cover: File No. 25,361. S. Dakota D. C. U. S. Term No. 531. The City of Mitchell, appellant, vs. Dakota Central Telephone Company. Filed June 24th, 1916. File No. 25,361.